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In the Supreme Court of the United States

No. 690

OCTOBER TERM, 1967.

RONALD CARABBIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1967.

RONALD CARABBIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix, page A1. The order overruling petitioner's petition for rehearing is printed in Appendix, page A17.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 31, 1967. A petition for rehearing was denied by an order filed September 6, 1967. Jurisdiction of this Court is invoked under Title 28

U.S.C., 1254 (1) and Rule 19 (b), Supreme Court Rules, Title 28 U. S. C.

QUESTIONS PRESENTED.

1. Is the decision of the Court of Appeals, Sixth Circuit, affirming the District Court's denial of petitioner's motion to dismiss the indictment on the grounds that it does not state an offense erroneous, in conflict with the decision of the Court of Appeals, Fifth Circuit, in *Kolaski v. United States,* 362 F. 2d 847, and contrary to the proper administration of justice?

2. Does the trial judge's refusal to inquire of prospective jurors whether they have any prejudice against the petitioner because he was engaged in the gambling business, when requested to so inquire, deny to petitioner his right to trial by an impartial jury as guaranteed by the Sixth Amendment to the Constitution of the United States?

3. Does the failure of the trial judge to properly instruct the jurors on the word "willful" as used in a felony statute and the affirmance of the erroneous instruction by the Court of Appeals, Sixth Circuit, deny petitioner his right to trial by jury and conflict with the decisions of this Court and other Courts of Appeal?

4. Was the hearing ordered by the Court of Appeals, Sixth Circuit, and limited by the District Court to witnesses provided by the prosecution, into the illegal use of electronic eavesdropping devices by Government agents so curtailed as to conflict with the decisions of this Court setting forth the scope of such hearings (*Hoffa v. United States,* 18 L. ed. 2d 738) and so far depart from the usual course of judicial proceedings as to demand the exercise of this Court's power of supervision?

5. Does a trial judge show partiality before a jury when he cross-examines a Government witness to rehabilitate him and attempt to change the testimony of the witness and when he examines other witnesses obviously to re-emphasize to the jury evidence damaging to the petitioner and makes uncalled for remarks detrimental to petitioner's cause when making erroneous rulings?

CONSTITUTION, RULES, STATUTES AND REGULATIONS INVOLVED.

Constitution of the United States—Amendment V:

"AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States—Amendment VI:

"AMENDMENT VI—JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Rule 19 Supreme Court Rules, Title 28 U. S. C.:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Rule 24 Federal Rules of Criminal Procedure, Title 18 U. S. C.:

"(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

Section 7206 (1) of Title 26 U. S. C.:

"(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or"

Section 6065 (a) of Title 26 U. S. C.:

"(a) Penalties of perjury.—Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

Section 4412 (a) (1) (2) (3) of Title 26 U. S. C.:

"(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

26 Code of Fed. Reg. 44.4412-1 (b) (2):

"(b) Information to be reported on Form 11-C.

"(2) Each person engaged in the business of accepting wagers on his own account shall report on

Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked 'Supplemental,' each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see Section 44.4905-2."

26 Code of Fed. Reg. 44.6017-1 (b) (1):

"(b) Return on Form 11-C. (1) The first return required to be made on Form 11-C shall be filed to cover the period beginning with the first day of the calendar month in which a person engages (or expects to engage) in activities which make him liable for the special tax imposed by section 4411 and ending with the following June 30. Thereafter, each return required to be made on Form 11-C shall be filed on or before July 1 to cover a 1-year period (beginning July 1 and ending June 30 of the following calendar year) during which taxable activity continues."

STATEMENT OF THE CASE.

The petitioner, Ronald Carabbia, is approximately thirty-six years of age and except for a period of two years, during which he served with the United States Marine Corps, has always been a resident of Struthers, a suburb of Youngstown, Ohio. Since 1955, petitioner has been engaged in a number of businesses among which were the operation of pool halls, the vending machine and pin ball machine business, and as owner of a confectionery store. It was in connection with this latter, which petitioner acquired early in 1962, that he engaged in the business of accepting wagers. This business known as the Stop 14 Confectionery was located in the steel mill district of Youngstown. The mill hands who frequented the store had in the past played numbers when they purchased cigarettes, soft drinks, candy and sundries. Petitioner found that when they could not play numbers, they went elsewhere to purchase these necessaries. Primarily because of this loss of business, petitioner decided to accept numbers and on January 31, 1962, filed a special tax return and application for registry-wagering (Form 11-C) with the District Director, Cleveland, Ohio (App. 41a). He began writing numbers on February 1st.

In the meantime on January 22, 1962, the Federal Bureau of Investigation caused a microphone to be installed, by trespass, in a store rented by petitioner and his brother. This device was connected to a receiver in the offices of the Federal Bureau of Investigation and remained in operation until March 23, 1962. Special Agent, John Relic, of the Internal Revenue Service testified at the trial of this case that he was assigned to the Youngstown, Ohio, area in October of 1961 and that he was given the name of the Carabbia brothers approximately the first of the year (App. 22a). According to his testimony, his

first contact with the petitioner was on January 25, 1962, three days after the microphone was planted (R. 156, App. 22a).[1] At a hearing subsequently ordered by the Court of Appeals to determine the extent of the Government's use of electronic listening devices, Agent Relic changed his testimony stating that he first contacted the Carabbias during the first week in November of 1961 (Tr. 379).

Petitioner also decided that he would expand his activities finding other spots where numbers could be accepted for him. He made such arrangements at Bill's Recreation and placed Michael Granchy there to accept numbers for him. He also talked with Andrew Kosco who ran a newsstand in Struthers. Kosco told him that Willie Gaul was writing numbers at the newsstand and refused when petitioner asked if he could have an agent there to accept and/or write numbers on his behalf. Petitioner's reason for not wanting Willie Gaul to take numbers on his behalf was his knowledge that Gaul had his own business and would only turn in, or lay off numbers which he, Gaul, did not want to bank himself. No arrangements were ever made with Kosco (R. 278, 283, 284, App. 7a).

In the meantime, Relic continued his "investigation." He took statements from Andy Kosco and Willie Gaul both of whom admitted that they were writing numbers. Relic told them they would have to have a stamp. After discussing the matter among themselves, Gaul filed a Form 11-C, received a stamp which he and Kosco posted on a mirror behind the bar at the newsstand. He listed

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[1] Petitioner has respectfully moved the Court of Appeals, Sixth Circuit, to forward the entire record to this Court in view of the hearing conducted pending the appeal and not a part of the appendix in the briefs filed in said court. References to that hearing are abbreviated (Tr.); to the transcript of the trial (R.) and to the appendices filed in the Court of Appeals (App.).

petitioner as the person on whose behalf he accepted wagers. He admittedly did this without the consent or knowledge of the petitioner (App. 8a, 9a, 15a.)

Relic knew that Willie Gaul had purchased the stamp and that Andrew Kosco and his brother, George Kosco, were writing numbers though they had not obtained a stamp. He also enlisted Gaul's assistance, asking Gaul if would keep records, which he did, and which he subsequently turned over to Relic (App. 16a).

Petitioner subsequently learned of the misrepresentation on Gaul's Form 11-C that he was Gaul's principal and when the time came to file a Form 11-C for the period July 1, 1962, to June 30, 1963, he told Gaul that he was on his own, and that he did not want Gaul to list him as his principal. Shortly thereafter petitioner filed the Form 11-C involved herein (App. 27a-30a). This return was for the statutory period July, 1962, to June 30, 1963 and was intended by statute and regulation to cover his activities for that future period.

Gaul continued to write numbers after July 1, 1962, as did the Kosco brothers, despite the fact that none of them registered with the District Director of Internal Revenue or obtained a stamp as provided by law for the period July 1, 1962, to June 30, 1963 (App. 21a). Relic, the Special Agent, was not only aware of these activities but as previously mentioned, had Gaul keeping records of the numbers he wrote which records were later turned over to Relic in September of 1962. Relic, by his own admission, did not again advise Gaul that he had to have a stamp after July 1, 1962, and never bothered to inquire whether the Kosco brothers had registered and obtained a stamp (App. 24a, 25a). Furthermore, Relic never recommended that proceedings, either civil or criminal, be instituted against Gaul or the Kosco brothers for their

unlawful activities (App. 10a, 20a, 24a). Such forbearance by so ardent an enforcement agent could only result from an agreement on the part of these people to testify for the prosecution. It should be noted that during the course of the trial the Court erroneously refused to permit counsel to explore the specific reason for Relic's assignment to the Youngstown area, his close association with Gaul and the Kosco brothers and his failure to recommend that any proceedings be instituted against these witnesses (App. 9a-14a, 20a, 24a, 35a).

Petitioner wrote numbers in Struthers from February 1, 1962, until December of 1962 at which time he terminated his business and turned in his stamp. During this period, he employed Steve Almasy and Mike Granchy to write numbers for him as previously mentioned.

There is no evidence in the record that petitioner accepted numbers from any persons other than Michael Granchy and Steve Almasy with the exception of the lay-offs from Willie Gaul who was himself an admitted principal or "owner" (App. 41a) and not an employee and/or agent of the defendant.

On or about October 9, 1963, petitioner was indicted on the following charge:

> "That on or about the 30th day of June, 1962, at Youngstown, Ohio, in the Northern District of Ohio, Eastern Division, Ronald Carabbia, unlawfully, willfully and knowingly, made and subscribed a United States Treasury Department Form 11-C Special Tax Return and Application for Registry-Wagering, for the period July 1, 1962 to June 30, 1963 which was verified by a written declaration that it was made under the penalties of perjury, which said Form 11-C Special Tax Return and Application for Registry-Wagering he did not believe to be true and correct as to every material matter in that the said Form 11-C

Special Tax Return and Application for Registry-Wagering stated that the defendant, Ronald Carabbia, had two employees and/or agents receiving wagers in his behalf, whereas, as he then and there well knew and believed he had a greater number of employees and/or agents receiving wagers in his behalf." (App. 4a.)

Petitioner pleaded not guilty. On May 19, 1965, he moved that the indictment be dismissed since it did not state an offense. This motion was denied on June 11, 1965. On June 14, 1965, petitioner went to trial before a jury in the United States District Court for the Northern District of Ohio, Eastern Division.

When the Government had completed its case, petitioner moved for a judgment of acquittal on the grounds that the prosecution had not offered sufficient evidence to sustain the charge and renewed his motion to dismiss the indictment (App. 26a). These Motions were denied by Judge Battisti (App. 26a). Subsequently, when all evidence had been presented, petitioner renewed his Motion for Judgment of Acquittal (App. 36a). Judge Battisti again denied the Motion (App. 36a). Petitioner also renewed his motion to dismiss the indictment which motion was again denied.

On June 21, 1965, the jury returned a verdict of guilty as charged (App. 42a). Subsequently, on August 23, 1965, Judge Frank J. Battisti sentenced petitioner to the maximum provided by law: three years imprisonment and a $5,000 fine (App. 45a).

On June 25, 1965, petitioner filed a Motion for New Trial and a Motion in Arrest of Judgment (App. 43a). Both Motions were denied by Judge Battisti on August 23, 1965 (App. 44a). Subsequently, on September 1, 1965, petitioner filed his Notice of Appeal.

Pending the appeal to the United States Court of Appeals for the Sixth Circuit, petitioner filed a Motion "* * * for an order requiring the United States Department of Justice to examine its files in connection with the investigation and prosecution of the above case to determine whether the defendant-appellant has been subject to electronic surveillance or wiretapping by either representatives of the United States Department of Justice or the Intelligence Division of the Internal Revenue Service, or any other agency of the United States Government, and report to the Court, under oath, whether there has been any such invasion of privacy in violation of the Constitution of the United States" (A2).

Pursuant to an order of the Court of Appeals, the Government acknowledged:

> "That a microphone had been placed in business premises apparently under the control of defendant and his brother. The microphone was in use *from January 22, 1962, until March 22, 1962.*" (Emphasis added) (A2).

Thereafter, on February 23, 1967, the Court of Appeals ordered that the case be remanded to the District Court with instructions "to conduct a prompt and full hearing upon all aspects of the Government's use of electronic equipment in the premises of defendant-appellant and determine its effect upon the trial and conviction of the defendant-appellant and whether or not a new trial should be granted or the indictment dismissed" (A11).

By agreement of counsel and the Trial Judge, the hearing ordered by the Court of Appeals was set for April 5, 1967. On March 13, 1967, counsel for petitioner caused subpoenae duces tecum to be issued to Charles Bates, Agent In Charge, Federal Bureau of Investigation, Frank S. Turbett, Jr., District Director, Internal Revenue Serv-

ice, and Merle M. McCurdy, United States Attorney, ordering them to produce specified records and documents essential to the preparation for the hearing ordered by the Court of Appeals. Counsel also caused a Motion under Rule 17(c) to be filed with the Trial Court requesting an "order that the subpoenaed documents be produced" on March 21, 1967. Not receiving a ruling from the Court, counsel on March 22, 1967, filed a Motion requesting an immediate hearing on the Motion under Rule 17(c). A conference was held in chambers on March 24, 1967, at which time the Court advised counsel for the Government to file an affidavit as to the extent of the Government's electronic surveillance and ordered that certain logs of the recorded conversations be turned over to the Court. The Trial Judge indicated that he would turn these logs over to petitioner subject to a protective order to be drawn by Government counsel and declined at this time to rule on defendant's Rule 17(c) Motion. On March 29, 1967, an Assistant United States Attorney under instructions of the Court attempted to deliver to petitioner's counsel the aforementioned logs under an order severely limiting and restricting the use counsel could make of the logs. In view of the limitations, counsel declined to accept the logs and on the following day requested the Court to reconsider its order. This the Court did, but not until April 5, 1967, the date of the hearing, at which time he vacated his previous order.

In view of the Court's failure to act upon the Rule 17(c) Motion, the petitioner caused subpoenae duces tecum to be served upon the government officials previously subpoenaed and 16 agents of the Federal Bureau of Investigation and Internal Revenue Service who participated in the investigations in the Youngstown, Ohio, area. When the hearing commenced on April 5, 1967, none of

the subpoenaed witnesses appeared and, when requested, the Trial Judge refused to order them to appear and produce. Instead, he ordered counsel for petitioner to proceed with the agents of the Federal Bureau of Investigation who had been brought to the hearing by the prosecuting attorney. Subsequently, on April 7, 1967, during the course of the hearing, the Trial Judge granted a Government Motion to suppress all of the subpoenae duces tecum. Petitioner accordingly was unable to conduct any independent inquiry into the use of electronic surveillance equipment by the Government.

Shortly after the hearing concluded the Trial Judge filed his Findings of Fact and Conclusions of Law to the effect that no evidence was introduced at the hearing to form a basis for ordering a new trial and that the judgment of conviction should stand.

Upon receiving service of the said findings and conclusions, counsel for petitioner caused a Motion to be filed in the Court of Appeals raising an issue as to the fairness of the hearing conducted by the Trial Judge (A20). Thereafter, on July 31, 1967, the Court of Appeals rendered its decision confirming the findings of fact and conclusions of law of the Trial Judge and affirming his judgment of conviction.

REASONS FOR GRANTING WRIT.

1.

The Court of Appeals' decision affirming the ruling of the District Court denying petitioner's Motion to Dismiss the Indictment for the reason that it does not state an offense is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Kolaski v. United States* (5th Cir. 1966), 362 F. 2d 847, and is contrary to the proper administration of criminal justice.

The indictment in this case charges the petitioner with a violation of Section 7206 (1) of Title 26 U. S. C. (a perjury statute) in filing a Form 11-C, Application for Registry-Wagering, for the period July 1, 1962, to June 30, 1963. The filing requirements and the statutory period for the Form 11-C are provided for in Section 4412 of Title 26 U. S. C., and Sections 44.4412-1 (b) (2) and 44.6071-1 (b) (1) of Title 26, Code of Federal Regulations.

Section 44.6071-1 (b) (1) of Title 26, Code of Federal Regulations, provides that the first Form 11-C shall cover the period beginning with the first day the person engages, or expects to engage, in wagering activity and ends with the following June 30, and that thereafter, a Form 11-C shall be filed *"before July 1 to cover a one-year period (beginning July 1,* and ending June 30, of the following calendar year) during which taxable activity continues." (Emphasis added.)

The information to be reported on said Form 11-C under Section 44.4412-1 (b) (2) of Title 26, Code of Federal Regulations is similarly designated. It is in part:

> "* * * the name and address of each place where such business *will be conducted* and the names, address and number appearing on the special (occupational) stamp of each agent or employee *who may receive wagers* on his behalf." (Emphasis added.)

The regulation further provides for supplemental returns in the event additional agents or employees are engaged.

Petitioner first filed a Form 11-C on January 31, 1962, for the period beginning February 1, 1962, and ending on June 30, 1962 (Government's Exhibit 2, App. 37b). Under this return, he complied with the statutory filing requirements for the period from the day he commenced the taxable activity to, and including, June 30, 1962.

On June 30, 1962, in an effort to comply with the above cited statute and regulations, the petitioner filed his Form 11-C for the statutory period July 1, 1962, to June 30, 1963 (Government's Exhibit 1, App. 36b). The information required on this return was the locations "where such business *will be conducted*" and information relating to "each agent or employee *who may receive wagers* on his behalf" for the statutory period of the return which was to commence the following day. Petitioner was not required by statute or regulations to state on the said Form 11-C information relating to employees and/or agents he had accepting wagers on his behalf on June 30, 1962, but rather the agents or employees who *may* accept wagers on his behalf during a period which was to begin the following day. The information called for by regulation, related to a future period. The clear and unequivocal words used in Section 44.4412-1 (b) (2) of Title 26, Code of Federal Regulations, "where such business *will* be conducted" and "each agent or employee who *may* receive wagers" firmly establish this.

Furthermore, this Court has had the opportunity to consider the period to which statements required on a Form 11-C relate. In the case of *United States v. Kahriger* (1953), 345 U. S. 22, 32, the Court, in considering the constitutionality of the wagering tax statute, stated:

> "Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. 8 Wigmore (3d ed, 1940) Section 2259 (c). If respondent wishes to take wagers subject to excise taxes under Section 3285, supra, he must pay an occupational tax and register. *Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed,* he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." (Emphasis added.)

The Solicitor General of the United States was of the same opinion, for he argued before this Court in the *Kahriger* case, as reported in 97 L. Ed., at page 756, that:

> "The privilege against self-incrimination is also not applicable because the registration statement required by the tax on wagers *does not require disclosure of unlawful activities. The tax applies in futuro.*" (Emphasis added.)

Under the indictment involved herein, the petitioner was charged with filing a Form 11-C for the period July 1, 1962, to June 30, 1963, which:

> "* * * he did not believe to be true and correct as to every material matter in that the said Form 11-C Special Tax Return and Application for Registry-Wagering stated that the defendant, Ronald Carabbia, had two employees and/or agents receiving wagers in his behalf, whereas, as he then and there well knew and believed he had a greater number of employees and/or agents receiving wagers in his behalf."

The Court of Appeals for the Sixth Circuit, in its order filed September 6, 1967, changed the indictment to read as follows:

"'That on * * * the 30th day of June, 1962, * * * Ronald Carabbia * * * subscribed * * * Form 11-C Special Tax Return and *Application for Registry-Wagering, for the period July 1, 1962 to June 30, 1963* which (Form 11-C) was verified by written declaration * * * (which declaration) he did not believe to be true and correct as to every material matter in that the said *Form 11-C * * * stated* that * * * Ronald Carrabia (then on June 30th) had two employees and/or agents receiving wagers in his behalf, whereas, * * * he (then on June 30th) had a greater number of employees and/or agents receiving wagers in his behalf.' (Emphasis added.)" (A18).

The emphasis and parenthetical material was added by the Court of Appeals either to make the indictment clear or to sustain its position that it did state a cause of action. In either event, the construction is clearly erroneous and in contravention to the above cited statute and regulations.

As previously shown under the statute and regulations involved, as construed by this Court, the Form 11-C was not intended to elicit the number of employees and/or agents receiving wagers on petitioner's behalf on the parenthetical date, June 30. Petitioner was not required to give that information and, in fact, did not give it. The indictment, therefore, does not state an offense.

If the indictment is correctly construed in accordance with the applicable statutes, regulations and decisions of this Court, it charges the filing of a Form 11-C by petitioner which he did not believe to be true and correct as to every material matter in that the said Form 11-C stated that the petitioner, Ronald Carabbia, had two employees and/or agents receiving wagers in his behalf (for the period July 1, 1962, to June 30, 1963, the statutory period of the return), whereas, he then and there well knew and

believed he had a greater number of employees and/or agents accepting wagers in his behalf (for the said period).

In *Kolaski v. United States* (5th Cir. 1966), 362 F. 2d 847, the Court considering an information purportedly charging the identical crime to that charged here, reversed the conviction and remanded the cause, stating:

> "*The statute here involved is a perjury statute.* As in the general statute on perjury, 18 U. S. C. A. Section 1621, the *gist of the offense is a false statement willfully* made, of a *material matter*. The statement must be *with respect to a fact or facts.*" (Emphasis added.)

Continuing, the Court held:

> "*It* (the information) *charges that, on October 26, 1964, he stated that he had no employees engaged in gambling for the period October 26, 1964, to June 30, 1965, and that he then and there well knew that he did in fact have employees engaged in gambling for the period October 26, 1964, to June 30, 1965.* Since it would have been impossible for the appellant, on October 26, 1964, to have then and there, in fact, had employees for a more than eight months period then beginning, the statement made in *the information could not be true and the truth of such statement was not susceptible of proof.* The information does not state an offense." (Emphasis added.)

Similarly here, the indictment properly construed does not state an offense.

The conflict between the decision of the Court of Appeals in this case and the Court of Appeals for the Fifth Circuit in the *Kolaski* case is apparent. The attempt by this Court of Appeals to avoid a conflict by supplementing the words of the indictment (adding dates) is contrary to law and of no effect, for it is well recognized that nothing can be added to an indictment without the concurrence

of the Grand Jury by which the bill was found. *Ex parte Bain,* 121 U. S. 1, 30 L. Ed. 849; *United States v. Norris,* (1930), 281 U. S. 619; 74 L. Ed. 1076.

This petitioner was induced and intimidated by an Internal Revenue Agent on January 25, 1962, to register under the wagering tax statutes (App. 11b) three days after a microphone (bug) was surreptitiously placed in his place of business, as admitted by the Attorney General of the United States in a memorandum lodged with the Court of Appeals for the Sixth Circuit, which memorandum states, in part, that the microphone was in operation from January 22, 1962, until March 22, 1962. (Opinion, United States Court of Appeals, App. A1.)

Is this case too dissimilar to that of No. 826, *Costello v. United States,* certiorari granted March 21, 1966, and No. 38, *Marchetti v. United States,* certiorari granted January 9, 1967? Or is the petitioner, having filed Form 11-C, barred from any relief, even though he might be induced to attempt to fully comply where to do so under the different interpretations of the meaning of the Form 11-C would subject him to prosecution on a "damned if you do and damned if you don't" basis?

Albertson v. Subversive Activities Control Board, (1965), 382 U. S. 70, 77:

> "* * * Nor can these requirements be viewed as requiring that petitioners answer—at the risk of criminal prosecution for error—only those items which will not incriminate petitioners; full compliance is required * * *."

The conflict between the regulations (requiring statements as to future events) and the form of the return required by the regulations, as well as the conflicting construction of the regulations by the Court of Appeals for the Fifth and Sixth Circuits and the prosecuting authorities does

violence to fair play and the proper administration of criminal justice. *Bouie v. Columbia* (1964), 378 U. S. 347; *Connally v. General Construction Co.* (1925), 269 U. S. 385; *McBoyle v. United States* (1921), 283 U. S. 25; *United States v. Noveck* (1926), 271 U. S. 201; *United States v. Cardiff* (1952), 344 U. S. 174; *Lanzetta v. New Jersey* (1939), 306 U. S. 451.

2.

Upon completing his voir dire examination of the prospective jurors the Trial Judge inquired of counsel whether they had any additional questions. Counsel for petitioner advised the Court that the petitioner in filing an Application for Registry-Wagering admitted he was a gambler, that is, engaged in the gambling business and requested the Trial Judge to inquire of the prospective jurors whether they might have any prejudice against a person engaged in such an occupation. This counsel felt was basic since it is generally recognized that the average citizen has strong feelings of animosity towards individuals engaged in such activities. The Trial Judge refused to make such an inquiry. (App. 6a).

The Court of Appeals for the Sixth Circuit concurred in the Trial Judge's decision reasoning that the Court did not abuse his discretion since he had read the indictment to the jurors, given a general discourse on and cautioned the jurors against prejudice and predisposition to judgment, and inquired whether they or members of their families ever held a Federal wagering tax stamp (A6).

The Sixth Amendment to the Constitution guarantees to every individual accused of a crime the right to trial by an impartial jury. This right can only be protected if the accused is given the opportunity to explore areas where common knowledge would indicate that prejudice may

lurk. This Court has consistently held that the way must be kept opened for the accused to search the minds of jurors where there is a possibility of prejudice.

In *Aldridge v. United States* (1931), 283 U. S. 308, the trial judge denied a Negro defendant the opportunity to inquire of white jurors whether they might be prejudiced against him because of his race. This Court reversed and remanded the case for a new trial stating that the "purpose of such an inquiry has been generally recognized" and is essential to the protection of the accused's right to trial by an impartial jury.

In *United States v. Dennis* (1950), 339 U. S. 162, this Court again had the opportunity to consider the basic right of the defendant to search the minds of the prospective jurors who were to decide his innocence or guilt. The opinion of the Court leaves no doubt as to the obligation of the trial judge where there is a reasonable likelihood of prejudice:

> "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. In both the Wood and Frazier cases, this court stressed that, while impaneling a jury, the trial court has a *serious duty to determine the question of actual bias* and a broad discretion in its rulings on challenges therefor. * * * In exercising its discretion, the *trial court must be zealous to protect the rights of an accused.*" (Emphasis added.)

Such inquiries are not discretionary, they are obligatory.

In a companion case to *United States v. Dennis* (*supra*) the court in *Morford v. United States* (1950), 339 U. S. 258 reversed the conviction where a trial judge refused defendant's counsel the opportunity to inquire of prospective jurors (government employees) whether the existence of a "Loyalty Order," Executive Order No. 9835

would have any influence on their ability to render an impartial verdict. The Court unequivocally held that:

> "Preservation of the opportunity to prove actual bias *is a guarantee of a defendant's right* to an impartial jury." (Emphasis added.)

Here that opportunity was denied petitioner. The trial judge shirked his duty to determine if, in fact, these jurors were prejudiced against the petitioner because of his unsavory occupation. The seriousness of this omission becomes readily apparent when we consider the publicity that numbers operators, bookies and gamblers have received in recent years in newspapers, on radio and television, and through motion pictures as a result of the formation of crime commissions, public hearings and the desire of many so-called crime fighters, radio and television networks and national magazines for sensationalism. By far in the greater majority of instances the publicity was and is directed towards Americans of Italian descent like this petitioner. It is public knowledge that the prejudice created by this publicity has been so detrimental that many Italian business and social groups were forced to demand that certain broadcasts be terminated.

If the prejudice so created, affected the lives of responsible citizens to such an extent, must we not acknowledge that there was a reasonable probability that these jurors harbored such prejudice?

In affirming the Trial Court, the Court of Appeals cited the Trial Judge's reading of the indictment, his general comments on prejudice, his general inquiry on prejudice and his inquiry as to whether the jurors or any member of their families ever held a Federal wagering tax stamp and concluded that the jurors were fully informed as to the nature of the case. This conclusion is refuted

by the trial judge's only question to the jurors on prejudice:

> "Now ladies and gentlemen, *keeping in mind what little you know about this case,* do any of you have any predisposition of mind? Any prejudice whatever in connection with a case of this kind?" (Emphasis added.) (Voir Dire Tr. 15.)

The words gambler, gambling business, numbers, or words of similar import were never uttered by the trial judge. Reading the transcript one gets the impression he scrupulously avoided enlightening the jurors. He mentioned "Federal wagering tax stamp" only when he sought to protect the Government (Voir Dire Tr. 27).

The ruling of the trial judge denying petitioner the opportunity to raise prejudice from the realm of speculation to that of fact and the affirmance of that ruling by the Court of Appeals, denied him the right to trial by an impartial jury guaranteed by the Sixth Amendment, are in direct conflict with the decision of this Court and so far depart from the usual course of judicial proceedings as to demand the exercise of this Court's supervision.

3.

Prior to the submission of this case to the jury petitioner requested the Trial Judge to charge the jury that to do an act "willfully" within the meaning of Title 18, U. S. C. A., Section 7206(1), a felony statute, means "that he acted willfully, that is, intentionally, knowingly, and with an evil mind and bad purpose." (App. 40a.) The Trial Judge refused to give the requested instruction, charging the jury instead, as follows:

> "To do an act willfully as used in the statute, means that the act was committed by the defendant voluntarily, with knowledge that it was prohibited by law,

and with the purpose of violating the law, and not by mistake, accident or in good faith."

The United States Court of Appeals for the Sixth Circuit affirmed the Trial Judge, holding "that a 'purpose of violating the law and not * * * in good faith' is substantially the same as 'evil mind and bad purpose'."

This interpretation of the Trial Judge's instructions by the Court of Appeals and its ruling that, as a matter of law, an act committed with the purpose of violating the law is per se, an act committed with an evil mind and bad purpose does violence to and is in direct conflict with decisions of this Court and the Courts of Appeals for the various circuits. This ruling by the Court of Appeals denies to petitioner the basic right to have a jury determine his motive in commiting the prohibited act.

This Court has held that a purpose of violating the law in and of itself is not sufficient to sustain a conviction. In *Murdock v. United States* (1933), 290 U. S. 389, this Court in considering the use of the word willfully in a misdemeanor statute held that though the "word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental," it has a more definitive meaning when used in a criminal statute—it "means an act done with a bad purpose * * * without justifiable excuse * * * *stubbornly, obstinately, perversely.*" To further emphasize the importance of the defendant's state of mind or motive in committing an act prohibited by a criminal statute this Court in *Murdock* stated that "an evil motive is a constituent element of the crime" and a defendant has the right to have the question of the *absence of an evil motive* submitted to the jury. This is true not only in cases involving the revenue acts but generally where statutes denounce an offense involv-

ing turpitude. *United States vs. Illinois Central R. R. Co.* (1938), 303 U. S. 239.

Again in the case of *Spies v. United States* (1943), 317 U. S. 492, 498 this Court unequivocally held that to constitute a criminal offense of any degree it would expect willfulness "to include some element of *evil motive* and want of justification." (Emphasis added.)

The Courts of Appeals for the various circuits have uniformly followed this Court's decisions holding that willfully as used in criminal statutes means "with a bad purpose or evil motive," *Abdul v. United States* (9th Cir. 1958), 244 F. 2d 292; bad purpose or bad motive, *Yarborough v. United States* (4th Cir. 1956), 230 F. 2d 56; evil motive, bad purpose and corrupt design, *Wilson v. United States* (9th Cir. 1957), 250 F. 2d 312.

This has in the past been true of the Court of Appeals for the Sixth Circuit. In *Smith v. United States* (6th Cir. 1948), 169 F. 2d 118, 121, the court held that to sustain a charge of perjury it must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed *willful and corrupt perjury* and further that the question of whether the defendant therein "*willfully and corruptly* testified falsely was an issue for determination by the jury."

It is obvious from the foregoing decisions that neither this Court nor the Courts of Appeals, which have followed its decisions, believe that a purpose of violating the law is substantially the same as an evil mind and bad purpose.

The repeated use of the terms "evil mind," "evil motive," "bad purpose," "corrupt design" and words of similar import and the emphasis placed upon them in successive decisions negate this concept.

Furthermore, to believe that a jury of lay people would attach the same significance to the phrase "purpose of violating the law and not by mistake, accident or in good faith" as they would to "evil motive and bad purpose" is to ignore reality. The use of words of such strong import as "evil," "corrupt" and "bad" in describing a required state of mind demands a jury to delve further into the evidence than were they merely to find a purpose of violating the law.

The conduct of the officials and agents of the United States in this case as well as thousands more is further illustrative of the error in the Court's reasoning. Here we had high officials of the Federal Bureau of Investigation and their agents knowingly, intentionally and purposefully violate the right to privacy guaranteed this petitioner by the Fourth Amendment of the Constitution. Are we to say that they, as a matter of law, had an evil mind and bad purpose in committing the trespass? There is no basis for such a finding. Though their acts cannot be condoned, we must recognize that their purpose may not have been evil.

The trial judge in the case of *United States vs. Sams* (W. D. Pa. 1963), 219 F. Supp. 164, aff'd (3rd Cir. 1965), 340 F. 2d 1014, cert. denied 380 U. S. 974, considering the use of the word willfully as used in the statute under which this petitioner was indicted and convicted, instructed the jury in accordance with the decisions of this Court as follows:

> "Well an act is done willfully if it is done deliberately and purposely with a specific intent to do what the law forbids. It actually means intentionally and voluntarily, *but more than that, because it includes an evil motive or bad purpose, it means an act done without justifiable excuse, stubbornly, obstinately, or*

perversely. It means an act done with a wicked, corrupt and criminal intent." (Emphasis added.)

Can we conceivably say that the state of mind described by the first sentence is in substance the same as that described by the following two sentences? Are the strong descriptive words used in the last two sentences of no legal significance? The answer must be in the negative.

The instruction given by the Trial Judge in the instant case and his refusal to instruct in the manner requested by petitioner substantially denied defendant his right to a trial by jury. There is a strong probability petitioner would not have been convicted had the jurors been given appropriate instructions.

4.

On or about December 6, 1966, prior to oral argument before the Court of Appeals, petitioner filed a motion requesting that Court to order the Attorney General to disclose whether electronic listening devices had been used in the investigation of his activities by numerous government agencies. The Court of Appeals granted the motion and pursuant to the Court's order the Attorney General acknowledged "that a microphone had been placed in business premises apparently under the control of defendant and his brother. *The microphone was in operation from January 22, 1962,* until March 22, 1962." (Emphasis added.)

On February 23, 1967, the Court of Appeals "ordered that the case be remanded to the District Court with instructions to conduct a prompt and full hearing upon all aspects of the government's use of electronic equipment in the premises of defendant-appellant and determine its effect upon the trial and conviction of the defendant-

appellant and whether or not a new trial should be granted or the indictment dismissed."

Commencing on April 5, 1967, and continuing until April 10, 1967, a hearing was conducted by the Trial Judge. The proceedings immediately preceding the hearing and the hearing itself sanctioned by the Court of Appeals were conducted by the Trial Judge in a manner that so far departed from the accepted and usual course of judicial proceedings as to demand the exercise of this Court's power of supervision.

Since the use of electronic eavesdropping equipment by the government in criminal investigations has become widespread this Court has had the opportunity to consider the appropriate remedy for such violations of the constitutional rights of citizens.

In *Black v. United States* (1966), 385 U. S. 26, 17 L. Ed. 2d 26 where the conversation overheard was between attorney and client the Court vacated the judgment of the Court of Appeals and remanded the case to the District Court for a new trial. In *O'Brien v. United* States (1967), 386 U. S. ____, 18 L. Ed. 2d 94 the Court having been advised that a "conversation in which O'Brien participated occurring after the indictment and concerning his forthcoming trial, was overheard" vacated the judgment of conviction and remanded the case to the District Court "for a new trial should the government seek to prosecute petitioner anew." The conversation overheard in the *O'Brien* case was also between attorney and client.

Subsequently, in *Hoffa v. United States* (1967), ____ U. S. ____, 18 L. Ed. 2d 738 the court being advised that conversations had been overheard by agents of the Federal Bureau of Investigation, remanded the case for hearing, findings and conclusions on the nature and relevance of

recorded conversations to convictions of all defendants. This case was distinguished from *Black* and *O'Brien* as there was "no direct intrusion here into attorney-client discussions." The scope of the proceedings ordered by the Court was confined to "the evidence presented by both sides * * * which is material to questions of the content of this *and any other electronically eavesdropped conversations*, and the relevance of *any such conversations* to petitioners' subsequent convictions." It is obvious that the Court strongly believed that the least the defendant was entitled to was a "full scale development of the facts" of the admitted eavesdropping and any other of which the government agents may have been guilty. See dissenting opinions in *Black v. United States* (*supra*); *O'Brien v. United States* (*supra*).

Here petitioner was not afforded a full scale development of the admitted violation of his constitutional rights and was afforded no opportunity whatsoever to search out other similar invasions of privacy.

The hearing conducted by Judge Battisti was first erroneously restricted to the electronic surveillance of the defendant at 620 Youngstown Poland Road, the instance admitted by the government (Tr. 17, 366, 373, 374). Petitioner was denied the opportunity of a full hearing to determine the extent of "any other electronic eavesdropped conversations" as ordered by this Court in *Hoffa v. United States* (*supra*).

Furthermore, the manner in which the Trial Judge conducted the hearing into this one instance of illegal activity did nothing but provide the government with an opportunity to clean its skirts. Petitioner was not only denied the opportunity to explore the extent of the eavesdropping but all efforts at discovery were thwarted by the Trial Judge as well as the Prosecuting Attorney. This was

done despite obvious, repeated and deliberate misrepresentations by the government agents, as hereinafter illustrated.

Pursuant to the Trial Judge's request that discovery be commenced by March 15, 1967, petitioner filed a Motion under Rule 17(c), Federal Rules of Criminal Procedure, requesting that three subpoenaed government officials be ordered to produce specified records by March 21, 1967. The Trial Judge took no action. A motion was filed on March 22, 1967, requesting him to do so. On March 24, 1967, he deferred action on said motion over counsel's objection (Tr. 4). On April 5, 1967, the day the hearing commenced he again deferred ruling on the said motion (Tr. 16). In addition petitioner's counsel had 18 subpoenae served on government agents who participated in the Youngstown investigations. None appeared on advice of the Prosecuting Attorney. The Court declined to order them in and subsequently quashed all subpoenas served by defendant (A31, A32). There was no discovery permitted petitioner.

At the outset of the hearing the Prosecuting Attorney stated:

> "Your Honor, we have produced *all of the original records in the case relating to the electronic surveillance* of 620 Youngstown Poland Road. They are the logs which we have produced in Court." (Tr. 26.) (Emphasis added.)

The agent in charge of the Federal Bureau of Investigation, Cleveland, Ohio, after being ordered by the court to bring in available records (Tr. 43) testified there were no records (Tr. 144, 145). The Resident Agent, Youngstown, Ohio, testified "I have never seen a record" (Tr. 61), and that he knew of no record showing when the device was installed (Tr. 71). The agent who installed the

device at 620 Youngstown Poland Road, Carl Ekblad, testified that "There is no other record" than the log (Tr. 172).

Agent Ekblad slipped however. He later testified that he refreshed his recollection as to when the device was disconnected from correspondence with Washington (Tr. 179). Then, and only then, did we find that records were kept; records of the installation, the effectiveness and the removal of the device, weekly reports and correspondence between the Resident Agent, Youngstown, and the Internal Revenue Service (Court's Exhibits 2 through 4 B; Tr. 364). Petitioner was denied the opportunity to examine many of these (Tr. 363-364).

Prior to production of these records the Resident Agent testified the device was installed because of rumors of barbut (dice) games (for which a federal stamp is not required), police protection for large winners, and in a quest for intelligence information relative to bombings (Tr. 68, 69). He further testified that this petitioner had no interest in the location and was not involved in any way (Tr. 69). The records finally produced show the purpose of the installation and persons to be surveilled: Charles Carabbia, Ronald Carabbia and Orlando Carabbia —IGA-Numbers-Lottery (Court's Exhibits 2 through 3). In addition, Agent Kelly who participated in the surveillance testified the Resident Agent advised him that petitioner had an interest in the building where the microphone was installed and in the activities conducted therein (Tr. 113).

When was the installation completed? Agent Ekblad, the installer, testified it was not completed until January 31, 1962, though the government first admitted in its memorandum to the Court of Appeals that the microphone was in operation "from January 22, 1962, until March 22, 1962" (A2). He was emphatic about this

date (Tr. 166, 168, 169). The limited records subsequently produced show the agent's testimony to be false (Tr. 237, 238). The seriousness of these misrepresentations, participated in by the Prosecuting Attorneys, becomes apparent in the light of the Internal Revenue Special Agent's testimony at the trial that he first talked to the defendant about his numbers activity on January 25, 1962, three days after the surveillance began (Trial Tr. 156). When the proximity of the dates became apparent Agent Relic changed his testimony as to all of the critical dates testified to at the trial (Tr. 398, 399, 400).

Was there communication between the Federal Bureau of Investigation and the Internal Revenue Service subsequent to the eavesdropping? Resident Agent Peterson testified that he never communicated with, or coordinated the electronic surveillance with, the Internal Revenue Service or its agents (Tr. 75, 76). The records subsequently produced also show this to be false (Tr. 248, Court's Exhibits 4, 4A, 4B). Peterson himself sent a summary, which petitioner and his counsel were not permitted to examine in full, to Internal Revenue. The report was dated March 22, 1962, the date the surveillance terminated and covered "Charles, Ronald, and Orlando Carabbia * * * IGA—Numbers—Lottery" (Tr. 248).

Here we have a situation where despite an order by the Court of Appeals that "a prompt and full hearing upon all aspects of the government's use of electronic eavesdropping equipment in the premises-appellant" the prosecuting attorneys and the government agents, all of whom were attorneys, deliberately misrepresented, and attempted to secrete, the extent of the government's illegal activity.

Despite this conduct by the government agents and attorneys, the Trial Judge again denied petitioner the opportunity to examine the government's records (Tr. 363

to 374, inclusive). Are records relating to illegal activity of government agents more sacred than the rights guaranteed by the Constitution? If so, it is a clear indication of the decay of our form of government.

Whereas, the remedy afforded by the Court of Appeals to right the wrongs of the government, may well be appropriate, the manner in which it was put into effect violates every concept of criminal justice and so departs from the usual course of judicial proceedings as to demand supervision by this Court.

5.

A Government witness, Andrew Kosco, testified on cross-examination that one gambling stamp had been purchased by William Gaul in early 1962 for his place of business, and with the acquiescence of Internal Revenue Agent John Relic, he, his brother, George Kosco, and William Gaul wrote wagers on numbers under the one gambling stamp. (The statute required each person who accepts wagers to register, pay the tax and possess a stamp) (App. 8a and 9a).

The Court thereupon cross-examined the Government witness, Andrew Kosco, relative to his conversations with Internal Revenue Agent John Relic.

> "Q. Did he say you had to have a stamp under your name if you wished to continue writing numbers? A. No.
>
> Q. Did he tell you what—what is your best recollection as to what Mr. Relic told you? A. He said we would have to have a stamp at the store in order to write the numbers.
>
> Q. In the store? A. Yes. If Mr. Relic said I would have to have it in my name, I would say that is it—I wouldn't write.

* * * * *

Q. And did the discussion come up with Mr. Relic as to whether you could write under someone else's name? A. he said we would have to have a stamp in the store, he evidently meant the business, that is what we done.

Q. When you were talking about the store? A. He was talking about the stamp, we would have to have the stamp in the establishment.

Q. Well, when Mr. Relic told you you would have to have a stamp in order to continue writing numbers, was it your understanding that the person who wrote the numbers would have to have a stamp?" (App. 11a).

One of petitioner's counsel objected to the tenor of the Court's questions.

"Court: I fully understand what he said previously, now if you have any objection put it on the record. (App. 11a.)

Mr. Kane: I have always objected.

Court: If you have an objection, put it quietly on the record.

Mr. Kane: I don't want words in his mouth. He said he didn't want a stamp in his own name, not that he didn't want a stamp, he didn't want a stamp in his name." (App. 12a.)

After counsel was silenced, the trial judge forcibly brought to the attention of the jury his utter disbelief in the testimony of this Government witness to whose testimony under the rules of evidence the Government bound itself.

"Q. *Did you tell Mr. Relic this is what was happening,* that somebody else was going to obtain the stamp? A. Yes.

Q. *Did you tell him that*? A. Yes.

Q. *You told him that*? A. Yes.

Q. For your place of business? A. It was not for me, it was for the place of business.

Q. And who was the business owned by, who owned it? A. I owned the business, yes.

Q. *Now, are you telling me that you told Mr. Relic* that Mr. Gaul would obtain the stamp for your place of business? A. Yes.

Q. *You told him that*? A. Why sure.

Q. *Now, just a moment, you told him that*? A. Yes.

Q. What did he say with regard to that statement? Did he say anything? A. I guess it was all right, we kept on writing.

Q. Did he say anything? A. I guess he said it was all right. I told him that Willie Gaul got the stamp. He didn't pat me on the back and say it was okay. I told him Willie Gaul would get the stamp and we would continue then writing numbers.

Q. And who would write them? A. Me and Gaul—Gaul and myself and my brother.

Q. *You told him that*? A. Yes." (App. 12a and 13a.) (Emphasis added.)

In cross-examining the petitioner, the prosecution inquired whether he had ever had a tenant by the name of Don Giraffe, a known numbers writer. The petitioner stated that Giraffe never worked for him nor was he ever a tenant. The prosecution in an effort to tie the petitioner in with Giraffe thereby inferring guilty from association attempted to pursue this line of questioning. Petitioner objected unless the prosecution had proof of such a relationship between petitioner and Giraffe. The Court overruled the objection with the comment "Obviously, he is heading that way," then added, *Maybe you don't want the question asked*" (App. 31a). These comments by the Court not only furthered the implication sought by the prosecution but indicated to the jury that counsel for petitioner was attempting to keep from them certain facts relative to a relationship between these two people. The

prosecution, it should be noted, did not at any time offer evidence to establish a relationship between the petitioner and Giraffe.

The testimony of Government witness, William Gaul, clearly points out the efforts of the trial judge to prevent his impeachment as a witness. In an effort to prevent any attack on his credibility and to negate any implication that his testimony may not have been wholly voluntary, the trial judge went to great lengths to impress upon the jury his opinion that a false statement by this witness as to his residence on a Form 11-C was not unlawful and could not be the basis of a criminal charge. He similarly prevented defense counsel from impeaching this witness, for when the witness hesitated in testifying whether he filed a Form 730 (reporting tax on wagers) the judge commented in the presence of the jury, "*Well, I wouldn't be too concerned about it*" (App. 17a). This witness, as previously shown, was the only witness who "testified" that the petitioner had more than two agents and/or employees writing number on his behalf.

The Constitutional guarantee of a trial by jury was blatantly interfered with by the trial judge. By no stretch of the imagination can it be said that the judge was trying to elicit testimony to aid and assist the jury in ferreting out the facts.

The trial judge continuously communicated his bias and prejudice to the jury through his examination of the prosecution's witnesses. His efforts to rehabilitate each of these witnesses after cross-examination and the emphasis which necessarily was placed on answers elicited by him constituted a flagrant abuse of the defendant's rights to a fair and impartial trial. These examinations by the trial judge were, because of their form, tantamount to testimony by the Court. In reading these excerpts, it

should be borne in mind that no new matter was elicited or for that matter sought to be elicited. The questions or statements by the Court were geared to emphasize, by repetition, previous testimony by this witness.

Questions by the Court (App. 20a):

"Q. Did Ronald Carabbia tell you why he did not want you to use his name as a principal?

A. No, he did not.

Q. *He did say to you he did not want you to use his name as principal?*

A. If he did, I don't remember—honestly.

Q. *I am asking you. I thought you testified to that?*

A. I said I don't recall him saying that, I am not sure.

Q. I just want to ask you a few more questions.

A. Okay, okay, go ahead—go ahead." (App. 20a).

* * * * *

"Q. On June 30th your stamp expired?

A. Yes, sir, yes, sir, that's right, that's right.

Q. *Did you continue to turn numbers in to Ronald Carabbia after June 30th?*

A. Yes, sir, yes, sir, yes, sir, that's right.

Q. Until what date?

A. I think it was the last of November.

Q. *Did you turn these numbers directly in to Ronald Carabbia?*

A. Yeah, yeah, yeah, yeah, that's right.

Q. In the bank?

A. Yes.

Q. *Into the bank of Ronald Carabbia?*

A. That's right, that's right.

Q. *Did Ronald Carabbia pay you a commission or did you take your commission?*

A. I took my commission. He would add up the stuff and—

Q. —When you spoke to Ronald Carabbia about renewing or obtaining a new stamp for the period beginning July, 1962—

A. Yeah?

Q. Did he know at that time or did you tell him before that time that you put his name on that Form 11-C? Well, let's put it the other way around. After you got the stamp, did you tell Ronald Carabbia you put his name down as the banker or principal?

A. *Gee—that—*

Q. *—Did you tell him?*

A. I must have told him.

Q. Is that your best recollection?

A. My best recollection? I may or may not have." (Emphasis added.) (App. 21a).

It is a strange travesty on justice when, as in this case, Government witnesses, after being cross-examined on behalf of the petitioner, were then cross-examined on behalf of the prosecution by the trial judge, and when the judge would not get the desired answer from the witness, the judge gave the answer in question form (contrary to all rules of evidence on questioning your own witness). This is illustrated by the following classic example:

"Q. *When you came to renewing or obtaining a new stamp after the first one had expired, did Ronald Carabbia, the defendant, give you any reason why he did not procure another application for you?*

A. Well, he said—I asked him, I said Ronnie will you get me an application, and he said, the first time I get to Youngstown I will. He said I will go pick one up and then I asked him again and he said I have not been up town yet."

Since this response was not the one desired, the following statement was then made by the Court:

"Q. *Did you testify on direct examination that in your conversation either in connection with the first*

stamp or in connection with the second stamp, that your conversation in connection with either one of those stamps concerning whether there were too many persons in Struthers with stamps?" (App. 22a).

Acquiescence to this statement by the witness gave the Court the answer it sought to have impressed on the minds of the jurors.

Finally, the trial court, over objection, permitted the Government to again question Internal Revenue Agent John Relic as on rebuttal (which was, in fact, not rebuttal but reiteration of his direct testimony) and surreptitiously endeavored to rebut the Government's own witness, Andrew Kosco.

This was a jury trial. The petitioner does not object to the number of pages of the transcript used by the trial judge in examining the Government witnesses. The Court of Appeals, in its opinion (A10), says there were 16 pages used by the judge. The petitioner objected to the way the trial judge conducted the examinations, the innuendoes, the emphasis and the general advocacy on his part of the prosecution's case, the cumulative effect of which constituted gross error.

That the trial judge was well aware of his violation of all rules of evidence in cross-examining Government witnesses on behalf of the Government and well aware of the fact that he overstepped all bounds of judicial conduct in his advocacy in this case, is well illustrated in the fact that in his general charge to the jury, the trial judge asked the jury to "disregard it and obliterate it from your minds" (App. 34b). After the jury arose and began to leave the jury box, the trial judge called them back and asked them to be seated. The trial judge again entreated the jury "to disregard" his own and counsel's advocacy during the trial (App. 34b, 35b).

CONCLUSION.

The affirmance by the Court of Appeals of the judgment of conviction rendered by the District Court and of the manner in which the trial judge conducted the hearing ordered by the Court of Appeals, into the admitted violation of the petitioner's constitutional rights by government agents through the use of electronic eavesdropping devices, is in conflict with the decisions of this Court and the Courts of Appeals for other circuits and so far departs from the expected and usual course of judicial proceedings as to demand exercise of this Court's power of supervision.

Accordingly, petitioner respectfully prays that a writ of certiorari issue from this Court to the United States Court of Appeals, Sixth Circuit.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 31, 1967.

Before: PHILLIPS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Ronald Carabbia, defendant-appellant, was convicted in the United States District Court for the Northern District of Ohio, Eastern Division, on a charge of filing a false United States Treasury Department form. The indictment upon which he was convicted reads as follows:

"The Grand Jury charges:

"That on or about the 30th day of June, 1962, at Youngstown, Ohio, in the Northern District of Ohio, Eastern Division, RONALD CARABBIA, unlawfully, willfully and knowingly, made and subscribed a United States Treasury Department Form 11-C Special Tax Return and Application for Registry-Wagering, for the period July 1, 1962 to June 30, 1963 which was verified by a written declaration that it was made under the penalties of perjury, which said Form 11-C Special Tax Return and Application for Registry-Wagering he did not believe to be true and correct as to every material matter in that the said Form 11-C Special Tax Return and Application for Registry-Wagering stated that the defendant, RONALD CARABBIA, had two employees and/or agents receiving wagers in his behalf, whereas, as he then and there well knew and believed he had a greater number of employees and/or agents receiving wagers in his behalf.

"In violation of Title 26, Section 7206(1), United States Code."

The defendant-appellant was tried before a jury, found guilty and sentenced to three years' imprisonment and to pay a fine of $5000. The defendant-appellant, hereinafter referred to as defendant, then appealed.

Pending this appeal counsel for the defendant filed a motion.

> "* * * for an order requiring the United States Department of Justice to examine its files in connection with the investigation and prosecution of the above case to determine whether the defendant-appellant has been subject to electronic surveillance or wire tapping by either representatives of the United States Department of Justice or the Intelligence Division of the Internal Revenue Service or any other agency of the United States Government, and report to the Court, under oath, whether there has been any such invasion of privacy in violation of the Constitution of the United States."

Counsel for the government admitted

> "* * * that a microphone had been placed in business premises apparently under the control of defendant and his brother. The microphone was in operation from January 22, 1962, until March 22, 1962. The conversations overheard were monitored by agents of the Federal Bureau of Investigation. Logs were kept in which appear summaries of the conversations overheard."

We remanded the case to the District Court with instructions to conduct a prompt and full hearing upon all aspects of the government's use of electronic equipment and to make findings of fact and report to this Court. (See copy of order hereto attached as Appendix A.) The district judge conducted a hearing and reported to this Court its findings of facts and conclusions of law. The district judge concluded that electronic surveillance of the defendant was not used in any way in the trial of this case. We have examined a transcript of the testimony at the hearing before the district judge and confirm his findings of facts and conclusions of law. (Copy of the findings of facts and con-

clusions of law is attached hereto as Appendix B.) The case having been submitted to the Court on briefs and oral arguments of counsel, we proceed to decide the appeal on its merits.

We consider first the claim that the indictment does not state an offense. The indictment of the Grand Jury is based on Section 7206(1),[1] Title 26, U.S.C. Section 4412 (a)(1), (2), Title 26, U.S.C. provides for registration in connection with the imposition of a tax on wagers under Sections 4401 and 4411, Title 26, U.S.C., and reads as follows:

> "(a) Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> "(1) his name and place of residence;
>
> "(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf."

Treasury regulations Sections 44.6071.1 and 44.4412-1 were promulgated by the Commissioner to implement the statute on registration. Regulation 44.6071.1(b) provides that initially when one desires to enter into the business of accepting wagers he must file a Form 11-C beginning with the first day of the calendar month in which he expects to engage in such business and ending with the following June 30th.

---

[1] "Any person who—

"(1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

"Thereafter, each return required to be made on Form 11-C shall be filed on or before July 1 to cover a 1-year period (beginning July 1 and ending June 30 of the following calendar year) during which taxable activity continues."

Regulation 44.4412-1(b)(2) provides:

"Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked 'Supplemental', each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see Section 44.4905-2."

Questions 5(b) and (c) of Form 11-C require the applicant to state the number of persons *engaged* in receiving wagers on his behalf and the name, address and tax stamp number for each such person.

Section 6065, Title 26, U.S.C. provides that any return or declaration required to be made under any provision of the revenue laws "shall contain or be verified by a written declaration that it is made under the penalties of perjury." Section 7206(1) under which this offense is prosecuted makes it an offense to make a false declaration.

The basis of the defendant's claim that the indictment does not state an offense is that he is charged with falsifying as to future events. This is a misinterpretation of the statute, the regulations and the allegations of the indict-

ment. The indictment charges the defendant with a violation in the language of the statute alleged to be violated. See *Hoover v. United States*, 358 F.2d 87 (C.A. 5), cert. den. 385 U.S. 822; *United States v. Chunn*, 347 F.2d 717 (C.A. 4). Form 11-C, which is the subject of the offense charged, is a renewal application to enable the defendant to continue in business for the ensuing governmental fiscal year. The indictment charges that the defendant committed an offense on June 30, 1962, in that he declared in Form 11-C that at that time he had only two employees or agents receiving wagers in his behalf, when he well knew and believed that at that time he had more than two employees receiving wagers on his behalf. Future employees would be reported by filing a supplemental Form 11-C. The government's case would fail unless it proved beyond a reasonable doubt that the defendant had more than two employees receiving wagers on his behalf on June 30, 1962.

We find no merit to the defendant's argument that the meaning of Section 7206(1) and the Regulations is vague. We conclude that the indictment states an offense.

Counsel for the defendant claim that the trial judge erred in not inquiring of the jurors on voir dire examination, upon request, if they had any prejudice by reason of the defendant being engaged in the gambling business.

The conduct of the voir dire examination is discretionary with the trial judge. In *Aldridge v. United States*, 283 U.S. 308, at p. 310, the Court said:

> "In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked. The exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness."

See also *United States v. Dennis*, 339 U.S. 162, 168, rehearing den. 339 U.S. 950; *Johnson v. United States*, 270 F.2d 721 (C.A. 9), cert. den. 362 U.S. 937; *Stone v. United States*, 324 F.2d 804 (C.A. 5), cert. den. 376 U.S. 938; *United States v. Barra*, 149 F.2d 489 (C.A. 2).

The question before us is whether the trial judge abused his discretion. The judge began his voir dire examination by reading the indictment to the jury. This was sufficient to inform the jurors that the defendant was engaged in the business of receiving wagers. Thereafter he conducted an extensive examination in which he cautioned the jurors against being prejudiced or predisposed to judgment. After explaining fully what was meant by prejudice, the jurors responded to a question that they had no prejudice. The jurors were asked whether they "or any members of their immediate family ever applied for or held a Federal wagering tax stamp." Upon reading the transcript of the voir dire examination, we conclude that the jurors were fully informed as to the nature of the case, that they were fairly examined as to prejudices and predisposition to judgment and that the trial judge did not abuse his discretion in refusing to ask a specific question suggested by counsel.

Another claim made on behalf of the defendant is that the trial judge erred in denying motions for acquittal where the prosecution did not prove perjury by the testimony of two witnesses or the testimony of one witness and corroborating evidence. This question was not specifically raised before the trial court by the motions of counsel for the defendant at the close of the government's evidence and at the close of all of the evidence at the trial. However, we proceed to discuss the question.

The defendant is not charged with perjury as defined by Section 1621, Title 18, U.S.C. The substance of the

offense created by this statute is the swearing falsely under oath taken either orally or subscribed to in writing before a person or tribunal competent to administer an oath in a matter in which a law of the United States authorizes an oath to be administered. Admittedly the two-witness rule is applicable to charges of perjury prosecuted under this statute. *Weiler v. United States,* 323 U.S. 606; *May v. United States,* 280 F.2d 555 (C.A. 6).

No oath is involved in the statute under which the defendant is prosecuted. The gist of the crime with which the defendant is charged is willfully making a declaration in a document under the pains and penalties of perjury which the declarant does not believe to be true as to every material matter. This section of the Code is more nearly analogous to Section 1001, Title 18, U.S.C., than it is to Section 1621. Section 1001 cases do not require the testimony of two witnesses or the testimony of one witness and corroborating evidence. *United States v. Killian,* 246 F.2d 77 (C.A. 7); *Fisher v. United States,* 231 F.2d 99 (C.A. 9). It is only essential that guilt be established beyond a reasonable doubt.

We are of the opinion, however, that the two-witness rule is met even though not required. In considering motions for acquittal or for a directed verdict, the court must view the evidence in the most favorable light to the government. *Glasser v. United States,* 315 U.S. 60, rehearing den. 315 U.S. 827; *United States v. Conti,* 339 F.2d 10 (C.A. 6). The testimony of William Gaul is to the effect that he and the Kosco brothers, Andy and George, were writing numbers for the defendant on June 30, 1962, the critical time in issue. It is claimed that Gaul's testimony is not supported by any other witness or by other independent corroborating evidence. We have examined the trial transcript and conclude that there is sufficient

evidence, when viewed in the most favorable light to the government, from which the jury could infer that Gaul and the Kosco brothers were writing numbers for the defendant at the time he made the application for a wagering stamp in question.

In addition there is the testimony of the defendant himself in which he admits that Gaul turned in wagers to him throughout the period in question.

> "Q. Did Willie Gaul continue to turn in to you after July 1st?
>
> "A. Yes, he gave me what he didn't want after July.
>
> "Q. The same as before July? He would come in there and give you slips and money?
>
> "A. Yes.
>
> "Q. And right up until the end of the time that you went out of the numbers business?
>
> "A. Yes, he told me he was getting his own stamp, and I took it for granted he had a stamp.
>
> "Q. He continued to turn in his numbers to you?
>
> "A. Yes, sir."

When the defendant offered evidence in his own behalf, after the government closed its case, which supplied any evidentiary defect in the government's case, he waived his contention of a failure of proof on the part of the government. *United States v. Goldstein*, 168 F.2d 666 (C.A. 2). The defendant seems to reason that he would have some immunity if Gaul had his own stamp and turned in to him only such numbers as Gaul did not want. We find no support for this theory. Everyone writing numbers whether principal or agent is required to have a stamp. Gaul's stamp listed the defendant as principal. The defendant claimed that he had not authorized this and did not know it. This was a fact for the jury to determine from all of the circumstances in the case.

Another assignment of error is the refusal of the trial judge to give the defendant's requested instruction No. 6 relative to the element of willfulness in a felony case.

The requested instruction reads as follows:

> "Before you can find the defendant guilty, you must be satisfied beyond a reasonable doubt that he acted willfully, that is intentionally, knowingly, and *with an evil mind and bad purpose.*" (Emphasis added.)

The trial judge, in his instructions, defined willfully, as follows:

> "To do an act willfully, as used in the statute, means that the act was committed by the defendant voluntarily, with knowledge that it was prohibited by law, and *with the purpose of violating the law and not by mistake, accident or in good faith.*" (Emphasis added.)

A trial judge is not required to give a requested instruction if the subject matter of the instruction is substantially covered in the judge's general charge. *United States v. Donovan,* 339 F.2d 404 (C.A. 7), cert. den. 380 U.S. 975; *Davis v. United States,* 226 F.2d 331 (C.A. 6), cert. den. 350 U.S. 965, rehearing den. 351 U.S. 915. We consider that a "purpose of violating the law and not * * * in good faith" is substantially the same as "evil mind and bad purpose." A purpose to violate a criminal statute is a bad purpose and one who contemplates doing so intentionally has an evil mind. The trial judge might well have given the instruction as requested but we find that he gave the substance of it in his general charge and that he was not in error in refusing it.

It is assigned as error that the trial judge, by his cross-examination of witnesses, and comments to defendant's counsel in the presence of the jury improperly conveyed

to the jury the impression that the judge was interested in a conviction of the defendant.

Counsel for the defendant refer to three separate and isolated instances where the trial judge made some comment to counsel in passing on objections. We do not consider that these comments reflected the judge's interest in the case or that they were prejudicial to the defendant.

The district judge questioned prosecution witnesses as follows: Andrew Kosco to the extent of ten pages of the transcript, William Gaul, four pages, Leo Ferranti, two pages, and John Relic on rebuttal, one question. In each instance he gave counsel an opportunity to ask additional questions. We said in *Knapp v. Kinsey*, 232 F.2d 458, 466, cert. den. 352 U.S. 892:

> "The trial judge in the federal court is more than a mere arbitrator to rule upon objections and to instruct the jury. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties. It is his duty to see that the issues are not obscured and that the testimony is not misunderstood. He has the right to interrogate witnesses for this purpose."

See also *Glasser v. United States, supra; United States v. Brandt*, 196 F.2d 653, 655 (C.A. 2).

We do not look with favor on extensive examination of witnesses by the trial judge in a jury trial. We do not find in this case, however, that the judge abused his discretion in this respect or that his questioning of witnesses constitutes prejudicial and reversible error. See *United States v. Lewis*, 338 F.2d 137, cert. den. 380 U.S. 978.

Finally, it is claimed that the defendant acted on the advice of a special agent of the Internal Revenue Service and that the evidence necessary to sustain a conviction was assembled by making use of the fruits of the agent's misdirection. It is contended that the jury should have

been instructed that if they find this to be a fact they should return a verdict of not guilty. We find no evidence to support this claim and conclude that it is without merit.

The judgment of the District Court is affirmed.

"APPENDIX A."

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REMANDING CASE TO DISTRICT COURT.

Before: PHILLIPS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

This cause is before the Court on motion of defendant-appellant, Ronald Carabbia,

> "* * * for an order requiring the United States Department of Justice to examine its files in connection with the investigation and prosecution of the above case to determine whether the defendant-appellant has been subject to electronic surveillance or wire tapping by either representatives of the United States Department of Justice or the Intelligence Division of the Internal Revenue Service or any other agency of the United States Government, and report to the Court, under oath, whether there has been any such invasion of privacy in violation of the Constitution of the United States."

on Memorandum of the Assistant Attorney General stating facts as follows:

> "* * * that a microphone had been placed in business premises apparently under the control of defendant and his brother. The microphone was in operation from January 22, 1962 until March 22, 1962. The conversations overheard were monitored by agents of the Federal Bureau of Investigation. Logs

were kept in which appear summaries of the conversations overheard."

and on memorandums of the parties with respect to the dismissal of defendant-appellant's motion and the disposition of the disclosure of electronic eavesdropping by the government.

Upon consideration of the motion of the defendant-appellant, the memorandum of disclosure by the government and the memorandums of the parties with respect thereto.

It is hereby ordered that the case be remanded to the District Court with instructions to conduct a prompt and full hearing upon all aspects of the government's use of electronic equipment in the premises of the defendant-appellant and determine its effect upon the trial and conviction of the defendant-appellant and whether or not a new trial should be granted or the indictment dismissed.

It is further ordered that the district judge make a finding of fact and report to this Court which will retain jurisdiction of the Appeal.

Entered by order of the Court.

Clerk.

APPENDIX "B."

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT RE GOVERNMENT'S USE OF ELECTRONIC EQUIPMENT.

(Filed May 29, 1967.)

Pursuant to an order entered by the Sixth Circuit Court of Appeals on February 23, 1967, this Court ordered that a hearing be commenced on April 5, 1967, to investigate all aspects of the Government's use of electronic lis-

tening equipment in the premises of the defendant-appellant. Prior to the commencement of this hearing, namely on March 24, 1967, the Government presented to the Court the original and one copy of certain logs which it represented to be the complete and only original records of what was overheard by the electronic surveillance which was disclosed by the Government to the Sixth Circuit Court of Appeals.[1] On the instruction of the Court, an Assistant United States Attorney delivered a copy of these logs to defense counsel on March 29, 1967, under a protective order which permitted the disclosure of the contents thereof by defense counsel only to the extent that they in good faith believed it necessary in order to prepare for the April 5, 1967, hearing. Defense counsel, evidently believing the protective order to be too restrictive, refused to accept the logs at that time.[2] On April 5, 1967, the Court, in order to expedite the hearing, revoked the protective order and, once again, had a copy of the logs delivered to defense counsel.

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[1] The logs were presented to the Court pursuant to a request made at an informal pretrial conference held on March 24, 1967. Counsel for the defendant states that the Court "refused" to rule on certain discovery requests made at that conference. It should be pointed out, however, that the Court did not "refuse" to rule on counsel's requests; rather, there was general agreement that a ruling on the discovery requests might best be deferred until counsel for the defendant had an opportunity to review the logs.

[2] The Court is of the opinion that defense counsel acted unreasonably and arbitrarily in refusing to accept the logs. Even assuming that there was reason to believe that the protective order was unduly restrictive—a position which appears to be entirely without merit—the soundest course of action would have been to accept the logs, study them carefully, and thereafter seek a modification of the protective order in the event counsel thought it necessary. The Court, since it had not reviewed the logs before turning them over, obviously had no way of knowing what they contained by way of relevant information. When counsel argues, as he did in this case, that the order might restrict even his perusal of the logs, he argues outside the realm of reason.

On the basis of the evidence introduced at the hearing conducted from April 5, 1967, to April 10, 1967, the Court makes the following findings of fact.

1. The listening device involved in the electronic surveillance of the defendant was a battery powered microphone installed on January 22, 1962, at the Modern News Center, 620 Youngstown-Poland Road, Struthers, Ohio, and connected by means of commercial telephone lines to the Youngstown, Ohio office of the Federal Bureau of Investigation (hereafter FBI). Several days after its installation, when the connection with the commercial telephone lines had been completed, the device was monitored on a spot check basis. Commencing January 31, 1962, logs were kept of the monitoring of the conversations overheard by means of the device. Logs were kept until March 19, 1962, and the device was discontinued on March 22, 1962.

2. The procedure employed by the FBI in monitoring the aforesaid device was substantially as follows: Agents of the FBI were assigned to the FBI's Youngstown Office to listen through earphones to the sounds which were emanating from the Struthers, Ohio address. They were directed to make entries in their logs of the discernible and intelligible conversations overheard during the monitoring period. The device was monitored at random times when personnel were available. The log entries would consist, as far as possible, of a verbatim transcription of that which was overheard. These logs were and are the only records of the conversations which were listened to by the agents. No tapes or sound recordings were made.

3. The Government has produced all of the logs which were made pursuant to the above-described monitoring procedure.

4. The Government provided and made available all of the individuals who participated in the monitoring of the above-described device or had anything to do with the listening process during the pertinent period. On the basis of the testimony of these individuals, the Court finds that all the information obtained by means of the monitoring device between January 31 and March 19, 1962, is reflected in the logs presented to the Court. No records were made in connection with the spot check monitoring which occurred prior to January 31, 1962.

5. Defendant Ronald Carabbia did not participate in any of the conversations which were overheard or listened to by the FBI.

6. The only information which was obtained by the Internal Revenue Service as a result of the FBI's monitoring of the premises of the defendant is set out in Court's Exhibits 4, 4a and 4b. The Internal Revenue special agent who investigated the charges which led to this prosecution received no investigative leads to this prosecution from the electronic device installed at the Modern News Center, 620 Youngstown-Poland Road, Struthers, Ohio, and he did not discuss this case or information obtained from the monitoring with any agent of the FBI.

7. The information contained in the logs is totally irrelevant to any of the issues raised during the trial.

8. None of the conversations overheard during the spot check monitoring which occurred prior to January 31, 1962, were relevant to any of the issues raised during the trial.

9. Nothing overheard or disseminated from the listening device did or could have led, either directly or in-

directly, to any evidence introduced in the course of the prosecution of this case.

10. The Government disclosed the electronic surveillance of the defendant's premises in accordance with the policy set forth in the Government's supplemental memorandum to the Supreme Court in *Schipani v. United States* (No. 504 October Term 1966). Implicit in the Government's disclosure of such surveillance is a representation on the part of the Government that there was no other electronic surveillance of the defendant. At the hearing, the Internal Revenue special agent who had charge of the investigation which led to this prosecution testified that there was no other electronic surveillance of Mr. Carabbia. The Court finds that the only electronic surveillance of the defendant was that discussed in findings of fact Nos. 1 through 9.[3]

CONCLUSIONS OF LAW.

The Court concludes, upon an inquiry into all aspects of the Government's use of electronic equipment in the premises of the defendant that:

1. Since none of the information overheard by the monitoring of the microphone at the Modern News Center, Struthers, Ohio was used as evidence or as leads to evidence admitted at the trial, there would be no basis for suppressing any of the evidence which was used in the prosecution of this case.

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[3] Counsel for Mr. Carabbia attempted during the course of the hearing to undertake a widescale, independent investigation of various governmental agencies in an effort to uncover further electronic surveillance. Taking into consideration the language of the Sixth Circuit Court of Appeals' order and the circumstances set out in this finding of fact, the Court deemed that such efforts on the part of defense counsel constituted nothing more than an unwarranted stab in the dark and, therefore, did not allow counsel to pursue the same.

2. The Court concludes, therefore, that there is no basis for ordering a new trial in this case and that the judgment of conviction should stand.

/s/ FRANK J. BATTISTI,
United States District Judge.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ENTERED JULY 31, 1967.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
CARL W. REUSS,
Clerk.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON REHEARING, FILED SEPTEMBER 6, 1967.

Before: PHILLIPS and PECK, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

This cause is before the Court on petition of the defendant-appellant for rehearing. The claim that the indictment fails to state an offense is without merit. The essence of the indictment is

"That on * * * the 30th day of June, 1962, * * * Ronald Carrabia * * * subscribed * * * Form 11-C Special Tax Return and *Application for Registry-Wagering, for the period July 1, 1962 to June 30, 1963* which (Form 11-C) was verified by written declaration * * * (which declaration) he did not believe to be true and correct as to every material matter in that the said *Form 11-C* * * * *stated* that * * * Ronald Carrabia (then on June 30th) had two employees and/or agents receiving wagers in his behalf, whereas, * * * he (then on June 30th) had a greater number of employees and/or agents receiving wagers in his behalf." (Emphasis added.)

Kolaski v. United States, 362 F.2d 847, C.A. 5, cited by counsel is not in point. In that case the indictment states

"(W)hich said special tax return he did not believe to be true and correct as to every material matter in that the said special tax and application for registry and wagering return stated *that the defendant had no employees and/or agents engaging in receiving wagers on his behalf for the period October 26, 1964, to June 30, 1965, * * **" (Emphasis added.)

The appellant's declaration was made on the 30th of June 1962 and, as is charged in the indictment, he declared that at that time he had only two employees or agents receiving wagers, whereas at that time he had more than two. In the *Kolaski* case it is clear that the declaration in the application relates to the future, that is, from October 26, 1964, to June 30, 1965.

In response to the order of this Court remanding the case to the District Court for the purpose of conducting a full and fair hearing with reference to electronic surveillance the district judge filed his Findings of Fact and Conclusions of Law on May 29, 1967. The opinion of the Court deciding the appeal on its merits was under date of July

31st. Now, for the first time, on petition for rehearing counsel for the defendant claim that the district judge did not conduct a full and fair hearing. They claim that the judge denied them process for the production of records and that he failed to make certain documents available in advance of the hearing.

In our opinion we said:

> "We have examined a transcript of the testimony at the hearing before the district judge and confirm his findings of fact and conclusions of law."

In a note to the Findings of Fact, the district judge said:

> "Counsel for Mr. Carrabia attempted during the course of the hearing to undertake a widescale, independent investigation of various governmental agencies in an effort to uncover further electronic surveillance. Taking into consideration the language of the Sixth Circuit Court of Appeals' order and the circumstances set out in this finding of fact, the Court deemed that such efforts on the part of defense counsel constituted nothing more than an unwarranted stab in the dark and, therefore, did not allow counsel to pursue the same."

In further consideration of the record on remand, we conclude that this ruling of the district judge was fully justified.

We find the further claims made by counsel on the petition for rehearing to be without merit.

It is therefore ordered that the petition for rehearing be and the same is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

MOTION OF APPELLANT FILED IN COURT OF APPEALS TO ORDER CLERK OF DISTRICT COURT TO CERTIFY ENTIRE RECORD, WITH ATTACHED EXHIBITS A and B.

Now comes the defendant-appellant and respectfully moves this Honorable Court to order the Clerk, United States District Court, Northern District of Ohio, to transmit to the Clerk of this Court, in accordance with Rule 15 of this Court's rules, "all the original papers in the file dealing with the action or proceeding in which the appeal is taken." No omissions from the said record have been agreed upon by the parties.

In support of the said motion, defendant-appellant states:

(1) The certification by the District Judge limiting the records sent to the Court of Appeals to the "findings of fact and conclusions of law and the transcript of the testimony at the hearing," absolutely prevents the Court of Appeals from knowing all of, and the extent of, the road blocks placed in front of the defendant-appellant.

(2) That the entire record must be before this Court to illustrate the manner in which the hearing and proceedings that immediately preceded it were conducted in contravention to this Court's order of February 23, 1967, that the District Court conduct "a prompt and full hearing upon all aspects of the government's use of electronic equipment in the premises of defendant-appellant * * *" and in violation of this defendant-appellant's rights under the Sixth Amendment to the Constitution of the United States.

Copies of the District Court's docket entries and defendant-appellant's proposed findings of fact are attached hereto and marked "Exhibits A and B" to illustrate the

extent of the aforesaid omissions and to avoid redundancy in setting forth defendant-appellant's contentions relative to the conduct of the hearing. *Remmer v. United States* (1956), 350 U.S. 377.

FRANK V. MORAN, JR.,
JOHN J. KANE, JR.,
Attorneys for Defendant-Appellant.

EXHIBIT A.

DISTRICT COURT'S DOCKET ENTRIES.

2/24/67. True copy order U.S.C.A. 6, of 2/23/67 remanding appeal to District Court for hearing on use of electronic equipment, findings of fact and report to be made to C.A. 6, as it retains jurisdiction of appeal filed. Copies to U. S. Atty. Moran, Kane & Judge Battisti.

3/13/67. Motion of the Defendant, Ronald Carabbia for Inspection before Trial under Rule 17 (c) of the Federal Rules of Criminal Procedure with Memorandum in support filed. Copy mailed March 13, 1967.

3/17/67. Motion of the Defendant, Ronald Carabbia for Protective Order with Memorandum in support filed. Copy mailed 3/17/67.

3/17/67. Memorandum of the Defendant in Opposition to Prosecution's Instructions to the Court filed. Copy mailed 3/17/67.

3/22/67. Motion of the Defendant requesting Immediate Hearing on Defendant's Motion filed March 13, 1967 Requesting Inspection of Documents before Hearing with Memorandum in support filed. Copy mailed 3/22/67.

3/24/67. Minutes of proceedings filed. (Hearing in chambers on motion for production-Government to produce all records immediately) Battisti, J.

3/28/67. 3 subpoenas retn. & filed. Served Charles Bates & Frank S. Turbett Jr. on 3/14/67, served Merle M. McCurdy on 3/20/67. Fees $6.00

3/21/67. Endorsed Ruling overruling Motion of the Defendant for Protective Order. Battisti, J.

3/29/67. Order overruling the motion filed March 17, 1967 for a Protective Order filed. Battisti, J. Copies served 3/29/67.

3/29/67. Order directing delivery of conversation "logs" to defense counsel, enjoining disclosure of contents and decreeing that no copies be made, logs to be returned to Government at conclusion of hearing on motion to suppress filed. Copies hand delivered—see cert. of N. Jones, attached.

3/29/67. Affidavit Attorney Wm. S. Lynch for Government re monitoring and tapes, etc., filed. Copies mailed 3/27/67.

3/30/67. Motion of the defendant for reconsideration of order of 3/29/67 filed. Copy mailed 3/30/67.

4/3/67. Motion of U.S.A. to quash subpoenas filed. Copies mailed 4/3/67.

4/5/67. Two (2) Defendant's subpoenas to produce returned and filed. Served Walter Featherstun 3/30/67; Merle M. McCurdy 3/31/67.

4/5/67. Minutes of proceedings filed. Hearing on use of electronic devices begun, but not concluded, adjourned until 10:00 a.m. tomorrow morning. Battisti J. Thompson R. (Order of 3/29/67 is vacated—motion for reconsideration is overruled as moot—motion to quash subpoena sustained)

4/5/67. Affidavit of William S. Lynch Re: electronic eavesdropping device filed.

4/5/67. Affidavit of John D. Relic Re: electronic eavesdropping device filed.

4/6/67. True copy of Order of U.S.C.A. denying motion of defendant-appellant for reconsideration of order of Feb. 23, 1967 and to reverse and remand for new trial or for dismissal; further order that District Judge conduct hearing in accordance with order of Feb. 23, 1967 and report findings to U.S.C.A. which retains jurisdiction of the appeal filed.

4/6/67. Order vacating the order of 3/29/67 and sustaining the motion to quash subpoenas as to Frank S. Turbett, Jr., filed. Battisti J. Copies delivered to Moran, Kane & Lynch by clerk.

4/6/67. Order striking the affidavits of William S. Lynch & John D. Relic filed on 4/5/67 from the file filed, Battisti J. Copies delivered to Moran, Kane & Lynch by clerk. (Affidavits delivered to Lynch by clerk.)

4/6/67. Hearing on use of electronic devices resumed, but not concluded, adjourned until 9:30 a.m. tomorrow. Battisti J. Thompson R.

4/7/67. Minutes of proceedings filed. Battisti J. Thompson R. Hearing on use of electronic devices resumed, but not concluded, adjourned until 10:00 a.m. Monday morning.

4/10/67. Defendant's subpoena to produce returned and filed. Served John E. Hoover, F.B.I., by serving James Gale, Asst. Director on 3/31/67.

4/10/67. Order sustaining motion of pltf. to quash subpoenas filed. Battisti J. Copies delivered to Lynch, Moran & Kane.

4/10/67. Minutes of proceedings filed. Hearing on use of electronic devices resumed & concluded. Taken under advisement. (counsel to prepare findings by 5/1/67) Battisti J. Thompson R.

4/10/67. Court's exhibits 1, 1a, 2, 2a, 3, 3a-1 thru 3a-14, 4, 4a, 4b, 5, 6, 6a-6e filed. Vault 330.

4/10/67. Defendants exhibit A filed. Vault 330.

4/11/67. Eighteen subpoenas of defendant retn. & filed. Served James Oar, etc., Frank S. Turbett, Jr., R. D. Cotner, Vincent Mariotte, Frank S. Turbett, Jr. (additional), John Sontich, Thomas Samara, etc., S. C. Vale, Frank Nousek, on 4/3/67; Billy Whaley could not be found; served Charles Bates, Agent DeGarmo, Agent McGregor, John Francis Conway, Frank Dowd, Stanley Peterson, James Snee and John B. Hodis 3/31/67. Fees $34.00.

5/1/67. Proposed finding of fact by deft. lodged.

5/26/67. Transcript of hearing commencing 4/5/67 filed. Battisti J. Thompson R.

5/26/67. Findings of fact & certificate of Judge Battisti mailed to U.S.C.A. 6th Circuit with Transcript Number 43 & transcript Numbered 44. Copies of findings mailed to Kane, Moran & 2 to U.S. Atty.

EXHIBIT B.

DEFENDANT'S PROPOSED FINDINGS OF FACT IN DISTRICT COURT.

On February 23, 1967, the United States Court of Appeals for this Sixth Circuit ordered "a prompt and full hearing upon all aspects of the government's use of electronic equipment in the premises of the defendant-appellant. * * *"

(1) By agreement of counsel and the Court on March 10, 1967, the hearing ordered by the Court of Appeals for the Sixth Circuit was set for April 5, 1967. The District Court at this time requested that defense counsel file any and all discovery proceedings by March 15, 1967.

(2) On March 13, 1967, counsel for defendant caused subpoenas duces tecum to be issued to Charles Bates,

Agent-in-Charge, Federal Bureau of Investigation, Cleveland, Ohio, Frank S. Turbett, Jr., District Director of Internal Revenue Service, Cleveland, Ohio, and Merle M. McCurdy, United States Attorney, Cleveland, Ohio, ordering them to bring in specific records and documents which were absolutely essential to the preparation for the full hearing ordered by the Court of Appeals. Counsel also caused a motion under Rule 17(c) to be filed with the District Court requesting that the Court order the documents enumerated in the subpoenas duces tecum to be produced on March 21, 1967.

(3) The District Court did not act upon the subpoenas duces tecum or the motion under Rule 17(c), and on March 22, 1967, counsel for defendant filed a motion in the District Court requesting an immediate hearing on defendant's motion under Rule 17(c). The Court set this latter motion for conference in chambers on March 24, 1967.

(4) At the conference on March 24, 1967, the Court advised counsel for the Government to file an affidavit and ordered that certain logs be turned over to the Court, and over the objection of counsel for the defendant, indicated that he would turn the logs over to the defendant's counsel subject to a protective order. The Court declined to rule on the motion under Rule 17(c) and subpoenas duces tecum.

(5) On March 29, 1967, Assistant United States Attorney, Nathaniel Jones, under instruction of the Court, attempted to deliver to counsel for the defendant certain logs, together with a copy of an order severely limiting and restricting the use to which counsel for the defendant could put the said logs. In view of the order, counsel for defendant had no alternative but to refuse to accept the said logs.

(6) On March 30, 1967, counsel for the defendant filed a motion with the Trial Court requesting that it consider its protective order of March 29, 1967. The Court did not consider this motion until April 5, 1967, at which time he vacated the said order. Counsel for defendant did not have access to the said logs until after the hearing commenced on April 5, 1967.

(7) In view of the Court's failure to act on defendant's Rule 17(c) motion, the counsel for defendant caused subpoenas duces tecum to be served on Charles Bates, Agent-in-Charge, Federal Bureau of Investigation, Cleveland, Ohio, Frank S. Turbett, Jr., District Director of Internal Revenue, Cleveland, Ohio, and John E. Hoover, Director of the Federal Bureau of Investigation, Washington, D. C., together with nine agents of the Federal Bureau of Investigation and eleven agents of the Internal Revenue Service who defense counsel knew were assigned to the investigations in the Youngstown, Ohio area during the period here involved. Subsequently, the prosecution filed a motion to quash said subpoenas duces tecum.

(8) No action was taken by the Court on the prosecution's motion to suppress the said subpoenas duces tecum prior to the start of the hearing. None of the witnesses subpoenaed on behalf of the defendant appeared at the hearing on April 5, 1967, and the Court refused to order that the said witnesses produce the records called for in the said subpoenas duces tecum. Instead, the Court ordered that counsel for the defendant proceed with witnesses hand-picked by the prosecution.

(9) Subsequently, on April 7, 1967, the Court sustained the prosecution's motion to suppress the said subpoenas duces tecum. No agents of the Internal Revenue Service, the Department of the United States Government

which recommended prosecution in this proceeding, appeared at the hearing ordered by the Court of Appeals.

(10) At the outset of the hearing on April 5, 1967, the Court refused to order that any records of the Federal Bureau of Investigation or the Internal Revenue Service, other than the above-mentioned logs, be made available to defense counsel,

(11) Letters in the possession of the prosecution firmly established that the defendant, Ronald Carabbia, had a proprietary interest in the premises at 620 Youngstown Poland Road, Youngstown, Ohio, at least during the year 1962.

(12) On January 22, 1962, Agent Eckblaud of the Federal Bureau of Investigation trespassed upon the premises of the defendant at 620 Youngstown Poland Road, Youngstown, Ohio, and installed therein an electronic eavesdropping device in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States. The said electronic eavesdropping device was connected by way of lines of the Ohio Bell Telephone Company to a receiver in the offices of the Federal Bureau of Investigation in Youngstown, Ohio, on January 22, 1962.

(13) The said electronic eavesdropping device at 620 Youngstown Poland Road, Youngstown, Ohio, remained in operation from January 22, 1962, until at least March 22, 1962.

(14) Letters in the files of the Federal Bureau of Investigation clearly establish that the purpose of the electronic eavesdropping device was to obtain evidence against the defendant, Ronald Carabbia, relative to his alleged participation in the numbers-lottery business.

(15) Correspondence in the files of the Federal Bureau of Investigation clearly establish that there was contact between officials of the Federal Bureau of Investigation and officials of the Internal Revenue Service relative to use of the electronic eavesdropping device and the subject of conversations overheard as a result of such use.

(16) No agent or employee of the Federal Bureau of Investigation made available to defense counsel by the Court could testify from independent recollection that the log produced in the Court was the original or a true copy of the log made by them during the periods they were assigned to monitor the said electronic eavesdropping device.

(17) During the course of the hearing ordered by the Court of Appeals, the trial judge refused to permit counsel for defendant to inquire into the use of electronic eavesdropping devices by the United States Government or any agencies thereof at any premises of the defendant, other than 620 Youngstown Poland Road, Youngstown, Ohio. The Court also refused to order any representative of the United States Government to bring in records pertaining to electronic eavesdropping at any premises, other than 620 Youngstown Poland Road, Youngstown, Ohio.

(18) The Court refusing to order any records of any agency of the United States Government pertaining to electronic eavesdropping to be produced and refusing to order any agents of the Internal Revenue Service to bring their records and appear before the Court, defendant rested.

(19) The prosecution called Internal Revenue Agent Relic who contradicted his testimony given at the trial of this cause. The Court, in justification for the agent's con-

tradiction, stated that there could have been five hundred misstatements by the agent during the course of the trial of this defendant.

(20) The prosecution failed to produce any witnesses who could testify as to the scope of the use of electronic eavesdropping devices at the premises of the defendant by agents of the Internal Revenue Service or agents of the Federal Bureau of Investigation, the evidence obtained during the course of such electronic eavesdropping or the use to which such evidence was put.

(21) The limited evidence brought out at the hearing was introduced over the violent objection of the prosecution, except the contradictions of Agent Relic.

(22) During the year 1962, law enforcement officers of the United States Government installed an electronic eavesdropping device in the premises of defendant at 620 Youngstown Poland Road, Youngstown, Ohio, by trespass, in violation of his rights under the Fourth Amendment to the Constitution of the United States, and by use thereof, obtained evidence or information which led to evidence which resulted in his conviction on a charge of violating 26 U.S.C.A., Section 7206 (1).

Respectfully submitted,

FRANK V. MORAN, JR.,
JOHN J. KANE, JR.,
Attorneys for Defendant.

ORDER OF UNITED STATES DISTRICT COURT DATED MARCH 29, 1967.

On March 24, 1967, the Court, by oral order in chambers, directed the Government to submit an affidavit setting forth the extent of electronic surveillance of the defendant, Ronald Carabbia, and to furnish the original and one copy of all logs of conversation monitored by the Government in which it is possible that the defendant was a participant. The affidavit has been submitted and filed with the clerk this date and a copy thereof mailed to defense counsel on March 27, 1967. The logs have been turned over to the Court and they will be hand delivered by Nathaniel Jones, Assistant United States Attorney, to defense counsel this date.

IT IS ORDERED that no part of the logs be publicized or disclosed by defense counsel to anyone or in any manner except insofar as it may be necessary in a good faith effort to prepare for and conduct a hearing on their motion to suppress.

IT IS FURTHER ORDERED that defense counsel make no copies of said logs, or permit others to do so, and that the logs be returned to the Government intact at the conclusion of the hearing on defendant's motion to suppress.

Dated this 29th day of March, 1967.

United States District Judge.

MOTION OF DEFENDANT IN DISTRICT COURT TO RECONSIDER ORDER OF MARCH 29, 1967, FILED MARCH 30, 1967.

Now come Frank V. Moran, Jr. and John J. Kane, Jr., attorneys in the within action, and respectfully move this Honorable Court to reconsider its order of March 29, 1967, which by the following language would seal the lips of counsel and make the use of any material offered by the Government a nullity in any hearing, at any time or for any purpose:

> "IT IS ORDERED that no part of the logs be publicized or disclosed by defense counsel to anyone or in any manner except insofar as it may be necessary in a good faith effort to prepare for and conduct a hearing on their motion to suppress.
>
> "IT IS FURTHER ORDERED that defense counsel make no copies of said logs, or permit others to do so, and that the logs be returned to the Government intact at the conclusion of the hearing on defendant's motion to suppress."

FRANK V. MORAN, JR.,
JOHN J. KANE, JR.,
Attorneys for Defendant.

ORDER OF DISTRICT COURT VACATING ORDER OF MARCH 29, 1967 AND SUSTAINING MOTION TO QUASH SUBPOENAS AS TO DIRECTOR OF INTERNAL REVENUE, FILED APRIL 6, 1967.

Upon consideration of proceedings during the hearing beginning April 5, 1967,

IT IS ORDERED that the order of March 29, 1967 is vacated and the motion to quash subpoenas is sustained as to Frank S. Turbett, Jr., District Director of Internal Revenue Service, Cleveland, Ohio.

FRANK J. BATTISTI,
U. S. D. C. Judge.

ORDER OF DISTRICT COURT SUSTAINING MOTION TO QUASH SUBPOENAS, FILED APRIL 10, 1967.

Upon consideration of the proceedings during the hearing beginning April 5, 1967,

IT IS ORDERED that the motion of the Plaintiff to quash subpoenas is hereby sustained.

FRANK J. BATTISTI,
U. S. D. C. Judge.

DEFENDANT'S MOTION IN DISTRICT COURT FOR INSPECTION BEFORE TRIAL UNDER RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WITH ATTACHED MEMORANDUM AND SUBPOENAS DUCES TECUM, FILED MARCH 13, 1967.

Now comes the defendant, Ronald Carabbia, by his attorneys, Frank V. Moran, Jr., and John J. Kane, Jr., and moves the Court for an order directing that items designated in the attached copies of subpoenas duces tecum be produced at a sufficient time prior to the hearing of this cause and at a place to be designated by the Court, for inspection by defendant and his counsel and for the purpose of preparing for the hearing ordered by the United States Court of Appeals for the Sixth Circuit.

FRANK V. MORAN, JR.,
JOHN J. KANE, JR.,
Attorneys for Defendant.

MEMORANDUM.

Rule 17(c), Federal Rules of Criminal Procedure:

"*For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. *The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.*" (Emphasis added.)

In the instant case, the attorneys for the Department of Justice admitted in papers filed with the United States Court of Appeals for the Sixth Circuit that they violated constitutional rights of this defendant, Ronald Carabbia, by placing the microphone (commonly known as a "bug") at a place or places operated or occupied by this defendant, Ronald Carabbia, and that conversations emanating from this microphone were overheard and recorded by Government agencies or employees of Government agencies.

While the order of the United States Court of Appeals refers to a microphone in a place of business of this defendant, the Court did not limit this hearing to conversations heard only on that microphone, but ordered that this Court "conduct a full and prompt hearing *upon all aspects* of the government's use of electronic equipment * * *" (emphasis added), including wire tapping. If the mandate of the Court of Appeals is to be complied with, it is necessary that each and every requested item in the attached three (3) subpoenas duces tecum be made available to this

defendant and his counsel long enough before the date of hearing so that counsel may properly prepare for the hearing and can subpoena the proper records, persons and companies. Only then can defendant be given assurance that the hearing into the Government's violation of his constitutional rights will be full and complete.

The documents set out in the attached three (3) subpoenas duces tecum are in the hands of, or under the control of the individuals named in said subpoenas duces tecum and are not available to this defendant through any other means.

Respectfully submitted,

FRANK V. MORAN, JR.,
JOHN J. KANE, JR.,
Attorneys for Defendant.

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT.

To Charles Bates
Agent-in-Charge, Federal Bureau of Investigation
Standard Building
Cleveland, Ohio 44113

You are hereby commanded to appear in the United States District Court for the Northern District of Ohio, Eastern Division, at Federal Building in the city of Cleveland, Ohio, on the 21st day of March, 1967 at ten o'clock A.M. to testify in the case of United States v. Ronald Carabbia and bring with you all memoranda, requests, papers, documents and/or orders for assignment of any and all attorneys, agents, employees and/or representatives of the Federal Bureau of Investigation in or to the Youngstown area of Ohio, during the period June 1, 1961, to date, to participate in the purported organized crime investigation ordered by the former Attorney General of the United States, Robert Kennedy, and involving the defendant-appellant, Ronald Carabbia, among others, together with the names and addresses of such attorneys, agents, employees and/or representatives, the specific dates when each of said attorneys, agents, employees and/or representatives overheard conversations of defendant-appellant, Ronald Carabbia, and/or others, through the use of electronic surveillance equipment, including, but not limited to, wire tapping equipment placed on or about the residence and/or places of business of said defendant-appellant, and any and all notes, memoranda and/or papers made by each of said attorneys, agents, employees and/or representatives.

C. B. WATKINS, *Clerk,*
By RICHARD R. PETERS,
Deputy Clerk.

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT.

To Merle M. McCurdy
United States Attorney
Federal Building
Cleveland, Ohio 44114

You are hereby commanded to appear in the United States District Court for the Northern District of Ohio, Eastern Division, at Federal Building in the city of Cleveland, Ohio, on the 21st day of March, 1967 at ten o'clock A.M. to testify in the case of United States v. Ronald Carabbia and bring with you all original tapes, transcripts, notes, logs, summaries, reports, memoranda and/or papers containing conversations or parts of conversations of defendant-appellant, Ronald Carabbia, and/or any other persons identifiable or not, obtained by the use of electronic surveillance equipment, including, but not limited to, wire tapping equipment placed on or about the residence and/or places of business of said defendant-appellant, Ronald Carabbia, during the period June 1, 1961, to date, together with the names of any and all attorneys, employees and/or agents of the Department of Justice, Federal Bureau of Investigation, Internal Revenue Service and/or any other Government agencies to which such tapes, transcripts, notes, logs, etc. were available, and any and all notes, logs and/or memoranda made by each of said attorneys, employees and/or agents.

C. B. WATKINS, *Clerk*,
By RICHARD R. PETERS,
Deputy Clerk.

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT.

To Frank S. Turbett, Jr.
District Director of Internal Revenue Service,
Cleveland, Ohio
1240 East Ninth Street
Cleveland, Ohio 44199

You are hereby commanded to appear in the United States District Court for the Northern District of Ohio, Eastern Division, at Federal Building in the city of Cleveland, Ohio, on the 21st day of March, 1967 at ten o'clock A.M. to testify in the case of United States v. Ronald Carabbia and bring with you all memoranda, requests, papers, documents and/or orders for assignment of any and all attorneys, agents, employees and/or representatives of the Internal Revenue Service in or to the Youngstown area of Ohio, during the period June 1, 1961, to date, to participate in the purported organized crime investigation ordered by the former Attorney General of the United States, Robert Kennedy, and involving the defendant-appellant Ronald Carabbia, among others, together with the names and addresses of such attorneys, agents, employees and/or representatives, the specific dates when each of said attorneys, agents, employees and/or representatives overheard conversations of defendant-appellant, Ronald Carabbia, and/or others, through the use of electronic surveillance equipment, including, but not limited to, wire tapping equipment placed on or about the residence and/or places of business of said defendant-appellant, and any and all notes, memoranda and/or papers made by each of said attorneys, agents, employees and/or representatives.

C. B. WATKINS, *Clerk*,
By RICHARD R. PETERS,
Deputy Clerk.

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280-814—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 690

RONALD CARABBIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A17) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1967. A petition for rehearing was denied on September 6, 1967. The petition for a writ of certiorari was filed on October 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense.

2. Whether in conducting the *voir dire* the trial court erred in refusing to question jurors specifically concerning prejudice against gamblers.

3. Whether the instructions to the jury on the term "wilfully" were adequate.

4. Whether the hearing in the district court concerning the effect of electronic surveillance on the prosecution of this case was sufficiently broad.

5. Whether the trial judge's questioning of witnesses and his remarks incident to rulings were prejudicial.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Ohio of knowingly making false statements in a "Special Tax Return and Application for Registry—Wagering," in violation of 26 U.S.C. 7206(1) (A. App. 4a–5a, 42a).[1] On August 23, 1965, he was sentenced to imprisonment for a period of three years and fined $5,000 (A. App. 45a). The court of appeals affirmed the conviction and approved the district court's conclusion, upon limited remand, that electronic surveillance had not in any way tainted the trial of the case (Pet. App. A1–A17).

1. The evidence at trial showed that petitioner began operations in the "numbers" business in about February 1962 and terminated that business in December 1962 (T. Tr. 8–11, 20–24, 156, 159, 162–163, 266, 270). On January 4, 1962, he filed an original application for a wagering stamp as principal covering the

[1] A. App and G. App. refer to the appellant's and government's appendices below, respectively. The trial transcript (T. Tr.) and transcript of the hearing concerning electronic surveillance conducted while the case was on appeal (H. Tr.) are also filed with the Clerk of this Court.

period ending June 30, 1962 (T. Tr. 3–4, 7, 8–11, 270–274, 297; G. App. 37b). In an application for a wagering stamp for continuation of the business as principal, which was filed on June 30, 1962 (T. Tr. 290–291; G. App. 36b), petitioner stated that he was engaged in the business of accepting wagers on his own account and that two named persons were receiving wagers on his behalf (G. App. 36b). The government showed that, during the period from February 1962 to November 1962, petitioner continuously operated his numbers business through three other agents as well (T. Tr. 18–29, 32–33, 36–37, 40–41, 45–46, 53, 57, 70–72, 77–82, 84–98, 102–104, 108–122, 126–138, 146–153, 158–162, 277–279, 293, 301, 320–322, 331–333, 335, 339–340, 352–353).

2. While the case was on appeal, the government filed a memorandum with the court of appeals stating that from January 22, 1962, to March 22, 1962, an electronic listening device had been in operation on business premises apparently under the control of petitioner and his brother. The court of appeals remanded the case to the district court for a hearing on the question whether the prosecution of the case was tainted by the electronic surveillance (Pet. App. A11–A12).

At that hearing, all of the F.B.I. agents who were connected with the installation and monitoring of the microphone placed in the Modern News & Novelty Company—the premises in question—were made available for examination (H. Tr. 92). The government had previously turned over to the court the complete log sheets kept in the course of the surveillance and

a copy was delivered to defense counsel at the hearing (H. Tr. 16, 28, 35, 45, 72, 81). During the hearing, it was brought out that correspondence relating to installation and removal of the monitoring device was contained in the F.B.I. file on the case. That file was turned over to the court for *in camera* inspection, and the court disclosed to defense counsel all the relevant portions of the file (H. Tr. 179–203, 217, 226–227, 229, 237, 244–245, 253–254, 364–367, 377, 403–405, 414, 417–418, 431).

The logs delivered to the court, which cover a period from January 31, 1962, to March 19, 1962, reflect the total information obtained by the surveillance (H. Tr. 82). As petitioner's counsel conceded (H. Tr. 423–424), an inspection of the logs revealed nothing affecting the instant case (Def.'s Exh. A; H. Tr. 66–74, 77, 79–87, 91, 104–107, 115–117, 124–126, 138–140, 257–265, 269–271, 278–280, 282–293, 297–301, 308–310, 313–318, 323–326, 330–335, 339–345, 350–351, 353–355).

Moreover, the information gained from the surveillance was not transmitted from the F.B.I. to the Internal Revenue Service or to the Internal Revenue agent conducting the investigation (Court's Exh. 4; H. Tr. 75–76, 106–107, 125–126, 139–140, 248–252, 271, 283, 293, 301–302, 310, 318–319 326–327, 335, 345–346, 354, 363, 366–367, 378–391). The Internal Revenue Service investigation resulting in the present prosecution was completely independent of the surveillance by the F.B.I. agents and did not involve the use of electronic surveillance (H. Tr. 378–402).

On May 29, 1967, the district court filed its finding of facts and conclusions of law, holding that none of the information overheard by the monitoring of the microphone at the Modern News Center was used either as evidence or as leads to evidence in the instant trial and, accordingly, there was no basis for ordering a new trial (Pet. App. A12).

ARGUMENT

The indictment charged (A. App. 4a–5a):

> That on or about the 30th day of June, 1962, * * * [petitioner] unlawfully, wilfully and knowingly, made and subscribed a United States Treasury Department Form 11–C * * * which he did not believe to be true and correct as to every material matter in that [he therein stated that he] * * * had two employees and/or agents receiving wagers in his behalf, whereas, as he then and there well knew and believed he had a greater number of employees and/or agents receiving wagers in his behalf.

There is no merit to petitioner's contention (Pet. 15–21) that the indictment does not state an offense under 26 U.S.C. 7206(1). Contrary to petitioner's assertion, the indictment did not charge petitioner with making false statements concerning future events. Form 11C—a Special Tax Return and Application for Registry-Wagering—was filed by petitioner on June 30, 1962, to obtain for the fiscal year beginning July 1 a wagering tax stamp covering an existing and continuing business. Question number five on that form required the registrant to state whether he was then engaged in the business of accepting wagers on his

own account, the number of employees and/or agents then engaged in receiving wagers on his behalf and the name and address of such employees or agents.[2] The question on the form is plainly framed in the present tense. Petitioner entered the names of two agents receiving wagers on his behalf on June 30, 1962, although, he had at least three other agents receiving wagers on that date. The form called for information concerning an existing situation and petitioner answered falsely.[3]

2. On the *voir dire* the court read the indictment to the jury and then conducted an extensive inquiry of the jurors concerning their ability to decide the case on the evidence presented without prejudice (T. Tr. 1–23). After explaining fully what was meant by predisposition and prejudice, the court asked the jury if, keeping in mind the nature of the case, any juror felt any predisposition of mind to decide one way or the other (T. Tr. 14–15). He received a negative response. In these circumstances there is no merit to petitioner's complaint that he was prejudiced because the trial court declined specifically to inquire whether the jurors were prejudiced against gamblers (Pet. 21–24). It is clear from the entire *voir dire* that the

[2] This fact distinguishes this case from *Kolaski* v. *United States*, 362 F. 2d 847 (C.A. 5), which petitioner asserts is in conflict with the decision below. In *Kolaski* the indictment charged false statements relating to future operations.

[3] Whether petitioner could have refused to answer that question on Fifth Amendment grounds is not relevant. Having made the choice to answer rather than claim his privilege, he is subject to prosecution for answering falsely. *Dennis* v. *United States*, 384 U.S. 855, 866, and cases cited.

jury fully understood the nature of the charge and affirmed their ability to decide the case without predisposition or prejudice attributable to petitioner's occupation.

3. Petitioner's assertion that the charge on the question of wilfulness was inadequate (Pet. 24–28) is without basis. The court instructed the jury in pertinent part as follows (T. Tr. 384, 386):

> To do an act wilfully, as used in the statute, means that the act was committed by the defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law and not by mistake, accident or in good faith. An act is done knowingly when it is done voluntarily and purposely, and not because of mistake or accident.
>
> * * * * *
>
> As I stated previously, before you can find the defendant guilty you must be satisfied, beyond a reasonable doubt, that the defendant wilfully, knowingly and falsely swore to the matters charged. If you find that the intention to swear falsely did not exist or that he believed he had correctly stated the number of employees and/or agents accepting wagers on his behalf, and you find that such belief was an honest belief and he had reasonable ground for this belief, then you must find the defendant not guilty.

The first part of the instruction is one commonly given to define the concept of wilfulness (see, *e.g.*, Seventh Circuit Judicial Conference, *Manual on Jury Instructions in Federal Criminal Cases*, 33 F.R.D.

523, 553–555), and the second part was given exactly as requested by petitioner (T. Tr. 400).

4. Also without merit is petitioner's contention that the hearing concerning the use of electronic surveillance was unduly restricted (Pet. 28–34). The record shows that the court made a thoroughgoing inquiry into the effect of electronic surveillance upon the investigation and prosecution of the instant case. The government disclosed the only electronic surveillance that could have affected petitioner and produced all pertinent records in connection therewith. All personnel significantly connected with the operation appeared for examination. The witnesses and records established that the electronic surveillance had no impact on this case. Indeed, petitioner's counsel conceded as much. Petitioner's attempts to force broader production of government files and the appearance of administrative officials having only the most tenuous connection with the subject matter of the inquiry were properly denied.[4]

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[4] The implication that broad, unrestricted discovery is justified in the instant case because of demonstrated bad faith of the government in the disclosures made (Pet. 30–33) is based on a distorted statement of the record. For example, FBI agent Peterson testified to the effect that the electronic surveillance and its product were not communicated to the Internal Revenue Service (Pet. 33). Court's Exhibits 4, 4A, and 4B, cited by petitioner as demonstrating otherwise, do not involve communications with IRS concerning any electronic surveillance or information therefrom. Similarly, petitioner intimates that the government's representation that the log sheets were the only original record of the surveillance was false (Pet. 31–32); however, as amply indicated from the record, the logs were the total original records of the extent of the surveillance as an information source—these were the total operational logs of the surveillance. When

5. There is no merit to petitioner's suggestion that the conduct of the trial judge in questioning certain witnesses indicated bias or prejudice (Pet. 34–40). The most extensive examination of any witness by the court was that of Andrew Kosco (T. Tr. 47–57), an examination conceded by petitioner at trial to have been for the purpose of clearing up confusion on a particular point (T. Tr. 68). Similarly the court's remarks to a witness not to be too concerned about not knowing the difference between a Form 730 and other tax forms (Pet. 37) obviously have no connotation of bias against petitioner when read in context (T. Tr. 136). Likewise, the court's examination of William Gaul (T. Tr. 148–151), quoted by petitioner (Pet. 38–40), on its face indicates an attempt to clear up confusion in the testimony and, significantly, did not strike counsel as worthy of objection at the time. Finally, even the most cursory reading of agent Relic's testimony on rebuttal (T. Tr. 350–353) shows that it was aimed directly at petitioner's contrary testimony (T. Tr. 283–286, 293, 305–307, 320–322, 324–327) and was not a "surreptitious" endeavor to rebut the testimony of the government's own witness (Pet. 40).

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petitioner later insisted on production of the administrative file which contained nothing concerning what information had been obtained from the surveillance, it was given to the court for such use as deemed necessary after *in camera* inspection. The administrative file did little more than confirm what had already been disclosed in the government's memorandum in the court of appeals—that the monitoring device was installed from January 22, 1962 to March 22, 1962. Certainly no bad faith in disclosure was demonstrated by petitioner.

The trial judge did no more than appropriately intervene on occasion to clear up confusion and to keep the inquiry within reasonable bounds. *E.g., Knapp* v. *Kinsey,* 232 F. 2d 458, 466 (C.A. 6), certiorari denied, 352 U.S. 892; *United States* v. *Brandt,* 196 F. 2d 653, 655 (C.A. 2). Moreover, the court unequivocally instructed the jury not to consider statements, arguments and conduct of counsel or the court in determining petitioner's guilt or innocence (T. Tr. 392–394, 397). There is no reason to believe that those instructions were not followed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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